85-234

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CAPITOL SERVICE, INC., KOHLBERG THEATRES SERVICE CORPORATION, MARCUS THEATRES CORPORATION and UNITED ARTISTS THEATRE CIRCUIT, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Should the Seventh Circuit have condemned *all* motion picture "splits" as illegal *per se* when at least some kinds of "splits" have been found not to be anticompetitive and have been held by other courts of appeal and this Court to be subject to the Rule of Reason and where the trial in this case was limited to one particular "split" entered into by petitioners in the Milwaukee metropolitan area?

PARTIES TO THE PROCEEDING

The following corporations are petitioners in this action: Capitol Service, Inc., Kohlberg Theatres Service Corporation, Marins Theatres Corporation and United Artists Theatre Circuit, Inc. Petitioners furnish the following information in compliance with Supreme Court Rule 28.1:

Capitol Service, Inc. is a privately held corporation. It does not have any parent corporation and none of its stockholders are publicly held companies.

Kohlberg Theatres Service Corporation is a wholly-owned subsidiary of Waukegan Drive-In, Inc. None of the stockholders who own ten percent or more of the stock of Waukegan Drive-In, Inc. are publicly held companies.

Marcus Theatres Corporation is a wholly-owned subsidiary of the Marcus Corporation, a publicly held company. All of the stock of Marcus Theatres Corporation is owned by the Marcus Corporation.

United Artists Theatre Circuit, Inc. changed its name to United Artists Communications, Inc. in early 1982. United Artists Communications, Inc. is a publicly traded company, and does not have any parent corporation. To its knowledge none of its stockholders are publicly held companies which own ten percent or more of United Artists Communications, Inc.'s stock.

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STATUTES

Sherman Anti-Trust Act

15 U.S.C. § 1 2

15 U.S.C. § 4 3

IN THE

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OCTOBER TERM, 1985

No.

CAPITOL SERVICE, INC., KOHLBERG THEATRES SERVICE CORPORATION, MARCUS THEATRES CORPORATION AND UNITED ARTISTS THEATRE CIRCUIT, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals is reported at 756 F.2d 502 (Pet. App. 1a-11a). The court of appeals' Order denying the petition for rehearing and suggestion for rehearing en banc is unreported (Pet. App. 55a). The opinion and order of the District Court for the Eastern District of Wisconsin is reported at 568 F. Supp. 134 (Pet. App. 12a-54a).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on February 28, 1985 (Pet. App. 55a). A timely petition for rehearing and suggestion for rehearing en

banc was denied on April 22, 1985 (Pet. App. 55a). A timely petition for extension of time in which to file a petition for a writ of certiorari in this action was granted on July 25, 1985 by Justice Stevens, who extended petitioner's time to file to and including August 1, 1985, and this petition was filed by that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The statutory provision involved in this case is section 1 of the Sherman Anti-Trust Act, 15 U.S.C. §1, which provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This case involves motion picture "splits," a term which generally is understood to embrace a variety of differing arrangements for licensing motion pictures by which some or all of the exhibitors in a locality propose to the distributors the theatres which they believe would be most appropriate to show particular pictures. Such "splits," which have been common in the motion picture industry for decades, had been found not to be illegal *per se* in a number of court of appeals

opinions, at least one of which was affirmed by a 4-4 decision of this Court,[1] and were treated by the Justice Department itself as subject to the Rule of Reason until 1977.

On April 1, 1977, the Justice Department issued a press release stating for the first time that it considered split arrangements to be illegal *per se*.[2] A number of exhibitors then commenced an action for declaratory judgment against the Justice Department in which they obtained a determination that a split arrangement in Charlottesville, Virginia was not anticompetitive and should not be condemned as illegal *per se*. *Greenbrier Cinemas, Inc.* v. *Attorney General*, 511 F. Supp. 1046 (W.D. Va. 1981).

The Justice Department appealed the *Greenbrier* decision to the Fourth Circuit. However, apparently preferring to be in the Seventh rather than the Fourth Circuit, the Department withdrew its appeal and brought the instant action in the Eastern District of Wisconsin.[3] The complaint, discovery and trial in this case were all limited to the particular split

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[1] Viking Theatre Corp. v. Paramount Film Distributing Corp., 320 F.2d 285 (3d Cir. 1963), *aff'd by an equally divided Court*, 378 U.S. 123 (1964). *See also* Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17 (9th Cir. 1971); Seago v. North Carolina Theaters, Inc., 42 F.R.D. 627 (E.D.N.C. 1966), *aff'd per curiam*, 388 F.2d 987 (4th Cir. 1967), *cert. denied*, 390 U.S. 959 (1968); Brown v. Western Massachusetts Theatres, Inc., 288 F.2d 302 (1st Cir. 1961); and Wilder Enterprises, Inc. v. Allied Artists Pictures Corp., 1972-2 Trade Cas. (CCH) ¶62,886 (E.D. Va. 1970), *aff'd in part and vacated on other grounds*, 632 F.2d 1135 (4th Cir. 1980). *But see* General Cinema Corp. v. Buena Vista Distribution Co., Inc., 532 F. Supp. 1244 (C.D. Cal.), *aff'd in part*, 681 F.2d 594 (9th Cir. 1982); Cinema-Tex Enterprises, Inc. v. Santikos Theatres, Inc., 414 F. Supp. 640 (W.D. Tex. 1975), *aff'd in part and rev'd in part*, 535 F.2d 932 (5th Cir. 1976).

[2] *Greenbrier Cinemas, Inc.* v. *Attorney General*, 511 F. Supp. 1046, 1049 (W.D. Va. 1981).

[3] Jurisdiction in the present action was predicated on Section 4 of the Sherman Act, 15 U.S.C. §4.

arrangement which petitioners had entered into in Wisconsin.[4] The district court, in a finding petitioners did not appeal from, ruled that the split before it was illegal *per se* since it involved agreements by the exhibitors not to engage in competitive bidding, not to negotiate for pictures until they had been split and not to negotiate for films split to other exhibitors (Pet. App. 4a-5a). In its injunction, however, the district court went beyond the specific split involved in this case and barred petitioners from engaging in "any motion picture split agreements, in any form . . ." anywhere in the country (Pet. App. 54a). The district court thus condemned out of hand *all* split arrangements, which would include even the one in Charlottesville which the *Greenbrier* court had found after a full trial was *not* anticompetitive and should *not* be treated as illegal *per se*.

On appeal, the Seventh Circuit ordered that the district court's injunction be read as applying only to splits which involve agreements not to engage in competitive bidding, not to negotiate for pictures until they have been split and not to negotiate for films split to other exhibitors (Pet. App. 11a). Thus, as modified, the injunction would not apply to splits, such as the one involved in the *Greenbrier* case, which do not involve such agreements. At the same time, however, the Seventh Circuit's opinion contains language which could be interpreted as condemning even so-called "good" splits, *i.e.*,

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[4] The Complaint in this action referred only to the Milwaukee market (R. 1, ¶¶8(e), 10, 12, 15). The scope of defendants' discovery was limited to facts relating to the operation of the Milwaukee split by the District Court, which denied defendants' request for nationwide discovery on distributor participation in splits around the country (Pet. App. 10a). The only evidence on the record with respect to splits outside the Milwaukee market consisted of statements listing the markets in which defendants were participating in splits, or general testimony by distribution company executives about splits ten to twenty years ago that did not involve these exhibitors. There was thus *no* evidence sufficient to support a finding that splits outside Milwaukee are so perniciously anti-competitive and without redeeming value as to warrant application of a *per se* rule.

those which do not involve the kinds of agreements which were found to exist in Wisconsin and which would not be covered by the injunction as modified. (Indeed, it appears that this is how the opinion is being interpreted by the Justice Department.) Thus, the Court of Appeals stated:

> The anticompetitive character of the so-called "good" split agreement is readily apparent. A right of first negotiation as described by defendants, no matter how flexible in theory, is an agreement among competitors amounting to a horizontal restraint on competition illegal *per se* under Section 1.

Id. at 8a (citations and footnotes omitted).

As shown below, this *per se* condemnation of "good splits" is contrary to the holdings of this Court as well as those of other circuit and district courts.

REASONS FOR GRANTING THE WRIT

I.
THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL AND OF THIS COURT.

The Seventh Circuit's *per se* condemnation of even "good splits" conflicts, *inter alia*, with the decision in *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.*, 320 F.2d 285, 293 (3rd Cir. 1963), where the Third Circuit stated "we decline to hold the split system to be *per se* illegal, and we do not consider the system, standing alone, as evidence of a conspiracy to violate the antitrust laws." That decision was affirmed, 4-4, by this Court. 378 U.S. 123 (1964). *See also* the other conflicting decisions cited above at page 5 n.1.

In addition, the Seventh Circuit's decision is at war with this Court's decisions holding that rules of *per se* illegality should only be applied to agreements or practices which

demonstrably have a "pernicious effect on competition and lack . . . any redeeming virtue." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977); *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958).

Here, the findings and holding in *Greenbrier Cinemas, Inc., supra*, make it clear that "good splits," such as the one involved in that case, do not have a "pernicious effect on competition." Thus, the court noted that, according to the Justice Department's own complaint, the distributors "acquiesced" in the Charlottesville split and "had the power to force a termination of the split if they desired." 511 F. Supp. at 1049. The *Greenbrier* court went on to find, *inter alia*, that

> Anytime a distributor branch manager was unhappy with the theatre to which his picture was assigned or the license terms offered by the exhibitor to which his picture was assigned, he was free to negotiate with other exhibitors and to shop around to obtain the best possible license terms.
>
> * * *
>
> In every instance testified to at trial where a distributor objected to either the theatre to which its pictures had been assigned or to the license terms offered by the exhibitor initially assigned the picture, the distributor was able to license its picture to a theatre and at license terms that it found satisfactory.
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> * * *
>
> Each distributor represented to the court that during the split period it was not required at any time to negotiate with any exhibitors that it did not want to and was able to successfully negotiate with exhibitors other than the one assigned its pictures on the split when it wanted to.
>
> * * *

> There is no evidence of a single instance during the split where any of these four film distributors were precluded from negotiating with any exhibitor it desired.

Id. at 1055-1056, 1058. In light of these findings, it is clear that at least some splits do not have such a "pernicious effect on competition" as to justify *per se* treatment.

It is likewise evident that all splits cannot be condemned as being without "redeeming virtue." In Wisconsin, the split arrangements replaced a system of competitive bids (Pet. App. 3a). As virtually everyone, including the Justice Department, has recognized, the bidding system in the motion picture industry is replete with problems and inefficiencies (DX 534).[5] Thus, as shown by the present record, bidding leads to a haphazard and irrational allocation of available pictures to screens, with the result that pictures do not play in the most suitable theatres, on the appropriate number of runs, with the best geographical distribution, or in the neighborhoods where a particular picture is expected to be most popular (Porchetta Tr. 3032-33, 3037; Lewis Tr. 2300-01, 2325; Michael Tr. 3382-83; Marcus Tr. 3660-62; Hassanein Tr. 3898-900, Kominsky Tr. 2660-61; DX 570). All of this leads to inefficiencies in distributions which make it more difficult for motion pictures shown in theatres to compete with other forms of entertainment, including broadcast, television, cable TV and video cassettes. Bidding also leads to an inefficient lack of flexibility which often makes it impossible to shorten the length of a run or move a picture to a smaller theatre, no matter how badly it is performing at the box office (Porchetta Tr. 3037-38, 3040-41; Kominsky Tr. 2663-64; Lewis

[5] Citations to the record will give the number of the document and the page or paragraph numbers of the quoted materials, *i.e.*, R.1, ¶8. Citations to the trial transcript will give the name of the witness and the page number, *i.e.* (Lewis Tr. 2300). References to trial exhibits will be by exhibit number, *i.e.*, DX 534 for the defendants' exhibits.

Tr. 2306-07; Michael Tr. 3379-80). By contrast, splits enable the exhibitor and distributors to work together in developing the most effective distribution pattern for each picture in each particular market (Groh Tr. 3491-92; Marcus Tr. 3685-86; Porchetta Tr. 3078-83; Lewis Tr. 2336; Pickus Tr. 3811-14).

The Seventh Circuit decision also conflicts with *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). In that case, this Court refused to apply a rule of *per se* illegality to blanket copyright licenses offered by the association where licensees also had the option of dealing on a separate basis with the individual composer and publisher members of the association. *Id.* at 24. Applying the teaching of *Broadcast Music* to the present case, a split should not be condemned as *per se* illegal so long as distributors remain free to reject the split designee and negotiate simultaneous competitive offers with individual exhibitors—which is exactly what the *Greenbrier* court found to be the case with the Charlottesville split agreement.

In short, the Seventh Circuit's decision, which would condemn as illegal *per se* even "good splits" such as the one involved in the *Greenbrier* case, is directly contrary to the decisions of this Court as well as decisions of other courts of appeals and district courts.

II.
THE DECISION BELOW RAISES IMPORTANT ISSUES WITH RESPECT TO THE PROPER APPLICATION OF THE ANTITRUST LAWS.

The present case involves one of the most important issues in current antitrust jurisprudence—the proper application of rules of *per se* illegality. In a number of recent decisions, this Court has made it clear that such rules should not be applied mechanically but should rather be limited to

those cases where the facts warrant such automatic condemnation. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *National Collegiate Athletic Association* v. *Board of Regents of University of Oklahoma*, ____ U.S. ____, 104 S. Ct. 2948, 2962 n.26, 82 L. Ed. 2d 70, 86 n.26 (1984); *Jefferson Parish Hospital District No. 2* v. *Hyde*, ____ U.S. ____, 104 S. Ct. 1551, 1570, 80 L. Ed. 2d 2, 27 (1984) (O'Connor, J., concurring).

In the present case, the Seventh Circuit condemned so-called "good splits," such as the one in Charlottesville, on a record which contained virtually no evidence with respect to such arrangements.[6] The basis of the Seventh Circuit's decision in this regard was its bald assertion that, in the case of a "good split," "the time pressures under which the distributors operate preclude them from negotiating with other exhibitors" (Pet. App. 8a). This statement is directly contrary to the findings which the *Greenbrier* court made after a full trial with respect to the Charlottesville split. The Seventh Circuit also based its application of a *per se* rule on this Court's decision in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978), where there was "an agreement among competitors to refuse to discuss prices with potential customers until after negotiations [had] resulted in the initial selection of an engineer." Again, the *Greenbrier* court found that there was *no* such agreement in the case of the Charlottesville split. The Seventh Circuit's decision thus raises fundamental questions as to whether a new *per se* rule may be created without a full factual inquiry based upon a prior decision involving an entirely different factual situation.

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[6] *See* footnote 4, *supra*.

CONCLUSION

A writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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August 1985

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 83-2518

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CAPITOL SERVICE, INC., KOHLBERG THEATRES SERVICE CORPORATION, MARCUS THEATRES CORPORATION and UNITED ARTISTS THEATRE CIRCUIT, INC.,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 80 C 407—**Robert W. Warren**, *Judge.*

ARGUED JUNE 4, 1984—DECIDED FEBRUARY 28, 1985

Before BAUER and ESCHBACH, *Circuit Judges;* and EDWARDS, *Senior Circuit Judge.**

EDWARDS, *Senior Circuit Judge.* This is a civil antitrust action brought by the United States Government under Section 1 of the Sherman Act, 15 U.S.C. § 1, against four motion picture exhibitors who operate theatres in the Milwaukee, Wisconsin area. This action was tried to the court in a 4½ week trial. The United States District Court for the Eastern District of Wisconsin, Judge Robert W. Warren presiding, found defendants guilty of Section 1 violations in that the defendants' practice of "splitting,"

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* The Honorable George C. Edwards, Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

or allocating among themselves, the rights to negotiate for films released by motion picture distribution companies constituted both illegal price fixing and an illegal "scheme to divide products among themselves with the purpose of eliminating competition with respect to those products." *United States v. Capitol Service, Inc.*, 568 F.Supp. 134, 155 (E.D. Wis. 1983). Judge Warren issued the following injunction:

> The defendants are hereby enjoined from further engaging in any motion picture split agreements, in any form and with any person, in any motion picture exhibition market throughout the United States.

Id. Defendants appeal only the breadth of the injunction.

The District Court's opinion includes 13 pages of factual findings. Its findings of fact are not challenged on appeal. Only those facts necessary to an understanding and resolution of the issues raised by appellants will be repeated here.

The defendants-appellants, Capitol Service, Inc. ("Capitol Service"), Kohlberg Theatres Service Corporation ("Kohlberg"), Marcus Theatres Corporation ("Marcus"), and United Artists Theatre Circuit, Inc. ("UATC"), cumulatively operate approximately 90% of the first-run motion picture theatres in the Milwaukee metropolitan area. On November 30, 1977, representatives of each appellant met and formed a "split agreement." The District Court described the agreement as follows:

> Under the agreement, the defendants have grouped their theatres that primarily exhibit first-run motion pictures into three units of eleven screens each. On occasion, some of the defendants' theatres that are not included in the three units have been split pictures under the split agreement. Under the agreement, Marcus and UATC each constitute one unit since each has eleven primarily first-run screens in Milwaukee. Capitol Service, which has eight primarily first-run screens, and Kohlberg, which has

> three primarily first-run screens, together form the third unit. The defendants meet periodically or converse by telephone to split pictures.
>
> The split is a "picture-by-picture" split, meaning particular films are allocated to specific theatres. The exhibitors take turns selecting films for their respective theatres, making sure that no two theatres in the same geographic zone play the same film. Because General Cinema, which is not involved in the split, has two first-run theatres in Milwaukee, the defendants will sometimes "split around" the General Cinema theatres, meaning that they leave a run of the picture open in the event one of General Cinema's theatres obtains a license for the picture.

Id. at 140-141.

The District Court specifically found that appellants formed the split "for the purpose of eliminating competition among themselves." *Id.* at 142. The split was formed in response to what appellants viewed as the "excessive terms" which resulted from the distribution system previously used in the Milwaukee area—the competitive bid system. *Id.* at 143. Under the competitive bid system, motion picture distributors inform exhibitors of the release of new films by exhibitor solicitation letters. The letters provide a minimum of information about the film and include suggested minimum terms for the licensing of the film. *See Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 660 (6th Cir. 1982). The exhibitors then respond with competitive bids for the right to play the film at a particular theater. The bidding process often results in terms greater than that suggested in the solicitation letters. *United States v. Capitol Service, Inc.*, 568 F.Supp. at 138.

Licensing also occurs by competitive and noncompetitive negotiations. The latter occurring in "closed" or one exhibitor markets. Films are also distributed under the "track" system—a system of distribution to theaters on the basis of an established relationship between the dis-

tributor and exhibitor. *Id.* With the exception of the noncompetitive negotiations, all licenses are firm and not subject to downward adjustment following the playing of a picture. This forces exhibitors to bear a portion of the "risk" of producing, distributing, and exhibiting films.

The licensing of films frequently takes place before prints are available for screening. Thus, bids or negotiations are conducted without the exhibitors knowing anything more than a brief plot description and the names of the key personnel involved in making the film. The "blind bid" system is the object of opposition from exhibitors which has resulted in the enactment of anti-blind bidding statutes in at least 23 states. *Id. See Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656; *Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808 (3d Cir. 1982); *Warner Bros., Inc. v. Wilkinson*, 533 F.Supp. 105 (D. Utah 1982).

The District Court found that the Milwaukee split consisted of three basic agreements: (1) an agreement not to bid on pictures; (2) an agreement not to negotiate for a picture until it is split; and (3) an agreement not to negotiate for a picture split to another exhibitor. *Id.* at 143-146. The court further found that the split agreement had precisely the desired effect—price competition among the defendants was reduced. *Id.* at 146. The split reduced significantly the number of bids submitted by defendants. It resulted in a substantial reduction in the amount of guarantees paid by defendants to distributors. The number of downward adjustments in film rentals increased. Finally, the length of playtime for particular films shortened. The District Court concluded that "[e]ach of the above-noted results of the split affected the price paid for films." *Id.* at 147.

The District Court found, that as the agreement constituted price fixing and division of markets, the agreement violated the per se rule of antitrust law. *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958). *See Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Thus the agreement did not need to

be analyzed under the rule of reason and defendants' arguments concerning alleged benefits from the split did not need to be considered. *See Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

The District Court concluded its findings of fact and conclusions by law by noting that "[a]lthough the focus of the evidence presented in the instant case was the Milwaukee split agreement, evidence was presented indicating that the defendants are engaged in split agreements in other markets throughout the United States." *United States v. Capitol Service, Inc.*, 568 F.Supp. at 155.

Appellants' objection on appeal relates to the just quoted sentence. Appellants contend that the District Court lacked sufficient evidence to justify the issuance of a nationwide injunction barring them from engaging in "any motion picture split agreements, in any form...." Appellants do not contest, for purposes of this appeal, the correctness of the District Court's findings and conclusions relating to the Milwaukee split. Nor do they challenge the appropriateness of the District Court's injunction as applied to the Milwaukee geographical area. The narrow issue on appeal is whether the District Court was justified in issuing a nationwide injunction against all forms of split agreements when the trial was limited to the legality of the split entered into by the appellants covering the Milwaukee metropolitan area.

Appellants contend that all splits are not alike and that some splits are legal under Section 1 of the Sherman Act. Appellants contend that each split must be analyzed on its own facts under the rule of reason and that the District Court erred in finding that all splits are *per se* illegal. Splits which provide the split designee only a right of first negotiation, and do not prevent distributors from negotiating with the exhibitor of their choice do not, according to appellants, constitute either illegal price fixing or market allocation and thus are not *per se* illegal.

The position taken by appellants on appeal differs from that taken at trial in that, before the District Court,

they insisted that the Milwaukee split was a "good" split and involved only the right of first negotiation, which appellants insist does not constitute a *per se* violation of Section 1 of the Sherman Act. The District Court discussed this contention as follows:

> All the split does, maintain the defendants, is allocate among exhibitors the "right of first negotiation" for the films split. As the Court discusses below, however, the so-called "right of first negotiation," even as described by the defendants,[6] is an impediment to price competition in the market.
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> ---
>
> [6] When asked during trial how long the "right of first negotiation" for a film would last, Michael Kominsky of Marcus could state only that it lasted a "reasonable amount of time." (Tr. 2961-62). The response tends to show how little substance there is behind the defendants' phraseology.
>
> * * * *
>
> The "right of first negotiation" appears to the Court to be an empty phrase used by the defendant exhibitors to describe their agreement to negotiate only for the films allocated to their respective theatres. Once a batch of films has been split, the screens for a particuar period of playtime are booked up. A distributor has little chance of entering into meaningful negotiations for the licensing of a film at a theatre other than the split designee because other theatres have been designated for other films.

Id. at 143, 145 (footnote omitted).

Appellants rely on *Greenbrier Cinemas, Inc. v. Attorney General*, 511 F.Supp. 1046 (W.D. Va. 1981) to support their position that "good" splits do exist. *Greenbrier* involved a declaratory judgment action brought to determine whether a Charlottesville motion picture split was *per se* illegal under Section 1. The trial was "limited to the issue of what the split agreement was, how it

operated, and whether the agreement did constitute a *per se* violation of the Act *regardless of any effect it might or might not have had on competition or price.*" *Id.* at 1048 (emphasis added). The court found that the Charlottesville split was limited to a right of first negotiation and that distributors were free to ignore the split and negotiate with any exhibitor they pleased. *Id.* at 1054. The court then concluded that the split was not *per se* illegal under Section 1.

The *Greenbrier* decision has been the subject of criticism both on the grounds of its failure to consider the effect of the split on price or competition and its failure to consider the Supreme Court's decision in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). *See General Cinema Corp v. Buena Vista Distributor Co.*, 532 F.Supp. 1244, 1265-1266 (C.D. Cal. 1982). As the District Court found below, even a limited right of first negotiation has a profound effect on price competition. *United States v. Capitol Service, Inc.*, 568 F.Supp. at 143, 145.

The Supreme Court in *Professional Engineers* addressed "an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer." 435 U.S. at 692. The Court held that any supposed benefits from the restriction of competition were irrelevant under the appropriate Rule of Reason analysis. *Id.* at 693-696. The Court stated that there were two categories of antitrust analysis.

> In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the

> restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

Id. at 692 (footnote omitted). The Court went on to note that "[w]hile this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anti-competitive character of such an agreement. It operates as an absolute ban on competitive bidding...." *Id.*

The so-called "good" split which appellants seek to have removed from the prohibition of the injunction, similarly operates as a ban on competitive bidding. The District Court recognized that in theory a right of first negotiation did not preclude competitive negotiations. In fact, however, the time pressures under which the distributors operate preclude them from negotiating with other exhibitors.

> Once a batch of films has been split, the screens for a particular period of playtime are booked up. A distributor has little chance of entering into meaningful negotiations for the licensing of a film at a theatre other than the split designee because other theatres have been designated for other films.

United States v. Capitol Service, Inc., 568 F.Supp. at 145.

The anticompetitive character of the so-called "good" split agreement is readily apparent. *See General Cinema Corp. v. Buena Vista Distributor Co.*, 532 F.Supp. at 1260. A right of first negotiation as described by defendants, no matter how flexible in theory, is an agreement among competitors amounting to a horizontal restraint on competition illegal *per se* under Section 1.[1] *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963); *Timken Roller*

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[1] The Supreme Court decisions in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) and

(Footnote continued on following page)

Bearing Co. v. United States, 341 U.S. 593 (1951). The District Court did not err in enjoining defendants from "engaging in any motion picture split agreements, in any form. . . ."

Appellants also contend that the District Court erred in issuing a nationwide injunction. The basis of appellants' position is that the complaint, discovery, and trial were all limited to the Milwaukee market and that it "is fundamentally unfair to subject defendants to a nationwide injunction in such circumstances." Appellants' brief at 28 n. 15.

The issue at trial was the conduct of the appellants in the Milwaukee market. Appellants sought discovery concerning splits in other markets but were limited by the District Court to discovery relating to the operation of the Milwaukee split. On appeal, appellants contend they were denied a full and fair opportunity to litigate the effects of

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[1] *continued*

NCAA v. Board of Regents of the University of Oklahoma, et al., 104 S. Ct. 2948 (1984) do not militate against a conclusion that the split agreement constitutes a *per se* violation of Section 1. In *Broadcast Music*, the Court examined a horizontal agreement under the Rule of Reason and found it to be legal under Section 1. The Court specifically noted that the blanket licenses at issue were "to some extent a different product" and that there was no evidence that the creation of the new product was prompted by the purpose of restricting competition. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. at 13, 22. In *NCAA*, the Court also applied the Rule of Reason to a horizontal agreement. The Court noted, however, the unique circumstances which called for the application of the Rule of Reason rather than the *per se* rule. "[W]hat is critical is that this case involves an industry [college football] in which horizontal restraints on competition are essential if the product is to be available at all." *NCAA v. Board of Regents*, 104 S. Ct. at 2961. Neither of the characteristics unique to blanket licenses or to college football are present in split agreements. Split agreements do not create a new product and horizontal agreements are not essential to the existence of the movie industry.

splits in markets outside Milwaukee. *Id.* At trial, however, appellants did not seek nationwide discovery on the effects of splits in other markets but on distributor participation in splits around the country. *United States v. Capitol Service, Inc.*, 89 F.R.D. 578, 582 (E.D. Wis. 1981). The District Court properly ruled that the requested material was not relevant to distributor participation in the Milwaukee split. *Id.*

Having found appellants guilty of conduct which was illegal *per se* under Section 1, it was not an abuse of discretion for the District Court to enjoin appellants from engaging in such conduct anywhere in the United States. Geographical limitations regarding the issues at trial do not alter the court's broad remedial powers. Appellants have conducted their businesses in a manner forbidden by law. The District Court has large discretion in redressing antitrust violations and in fitting the decree to the special needs of the individual cases. *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972). Appellants based their defense at the District Court on the theory that the Milwaukee split was a "good" split. On appeal, appellants contend that although the Milwaukee split may not have been a "good" split, other splits may be conducted in conformance with the law. They wish to be permitted to form such splits. The split described by appellants as a "good" split has been shown to be illegal *per se* under Section 1. There is ample reason to enjoin appellants from engaging in any such split anywhere in the United States. "When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." *International Salt Co. v. United States*, 332 U.S. 392, 400 (1947). *See also United States v. Gypsum Co.*, 340 U.S. 76, 88-89 (1950); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 381 (1973) ("The proclivity for predatory practices has always been a consideration for the District Court in fashioning its antitrust decree.").

Appellants also contend that the injunction is imprecise in that "split" is not defined. *See Federal Rules of*

Civil Procedure 65(d).[2] We believe, however, that the District Judge carefully defined the term "split" as used in his injunctive order as follows:

> 1. "an agreement not to engage in competitive bidding,"
>
> 2. "an agreement . . . not to negotiate for pictures until they have been split," and
>
> 3. "an agreement . . . not to negotiate for films split to other [exhibitors]."

United States v. Capitol Service, Inc., 568 F.Supp. at 143, 145. We also believe that this definition should be regarded as incorporated into his judgment. It is so ordered.

For the reasons set forth above, the judgment of the District Court is in all respects affirmed.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

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[2] F.R.C.P. Rule 65(d) reads as follows:

> Form and Scope of Injunction of Restraining Order. Every order granting an injunction and every restraining order shall set forth the reason for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

USCA 50234—Pandick Midwest, Inc., Chicago—2-28-85—450

UNITED STATES OF AMERICA,

Plaintiff,

v.

CAPITOL SERVICE, INC., KOHLBERG THEATRES SERVICE CORPORATION, MARCUS THEATRES CORPORATION AND UNITED ARTISTS THEATRE CIRCUIT, INC.,

Defendants.

No. 80-C-407

United States District Court,
E.D. Wisconsin.

June 16, 1983.

Fred E. Haynes, John F. Greaney, J. Robert Kramer, Dorothy E. Hansberry, Attys., Antitrust Div., U.S. Dept. of Justice, Washington, D.C., for plaintiff.

Steven E. Keane, Trevor J. Will, Foley & Lardner, Milwaukee, Wis., and Peter M. Fishbein, Alan L. Mittman, Kaye, Scholer, Fierman, Hays & Handler, New York City, for defendants.

DECISION AND ORDER

WARREN, District Judge.

This is a civil antitrust action brought by the Government against four motion picture exhibitors who operate theatres in the Milwaukee area. The defendants, Capitol Service, Inc. ("Capitol Service"), Kohlberg Theatres Service Corporation ("Kohlberg"), Marcus Theatres Corporation ("Marcus"), and United Artists Theatre Circuit, Inc. ("UATC"), operate most of the first-run motion picture theatres in and around Milwaukee. The Government challenges as violative of Section 1 of the Sherman Act the defendants' practice of "splitting," or allocating among themselves, the

rights to negotiate for films released by motion picture distribution companies. The Government contends that the defendants' split agreement constitutes a restraint of trade which is *per se* illegal under the Sherman Act. The defendants maintain that the split does not restrain competition and that, even if it does create a restraint, the split is nonetheless "reasonable" when examined under the rule of reason.

Beginning on August 16, 1982, the Court conducted a 4½ week bench trial. The parties have submitted lengthy proposed findings of fact and conclusions of law as well as post-trial briefs. In addition, the *amici curiae* motion picture distribution companies have filed a post-trial brief. The Court now issues this opinion, which shall serve as its findings of fact and conclusions of law required by Rule 52(a) of the Federal Rules of Civil Procedure. Part I of this decision describes the motion picture industry generally and the manner in which films are licensed by distributors to exhibitors. Part II provides background information regarding the motion picture exhibition market in Milwaukee, including information about the defendants and a description of motion picture licensing in Milwaukee prior to the present split agreement. Part III describes the split agreement challenged by the Government here, including its purpose, its terms, and its effect on the licensing of motion pictures in Milwaukee. Part IV discusses the caselaw applicable to the facts as determined by the Court and, in particular, why the Milwaukee split must be condemned as *per se* illegal under the Sherman Act. Finally, Part V considers the scope of relief to be granted in view of the Court's determination of *per se* illegality.

I. THE MOTION PICTURE INDUSTRY

The motion picture industry encompasses three operations: production, distribution, and exhibition. Producers

make motion pictures and enter into agreements with distributors to have their films placed nationally into theatres owned and operated by exhibitors. Some distributors are also motion picture producers. In some instances, distributors will finance the production of films by independent producers.

There are seven major distributors of motion pictures: Buena Vista Distribution Co., Inc. ("Buena Vista"), which distributes Walt Disney pictures; Columbia Pictures Industries, Inc. ("Columbia"); Paramount Pictures Corp. ("Paramount"); Twentieth Century-Fox Film Corp. ("Fox"); MGM-UA Entertainment Co. ("UA" or "United Artists"); Universal Film Exchanges, Inc. ("Universal"); and Warner Brothers Distributing Corp. ("Warner Bros."). Metro-Goldwyn-Meyer was formerly a major distributor. In 1982 it merged with United Artists. In addition to the major distributors, there are a large number of so-called "independent" distributors. Among the largest of the independents (in terms of annual rental revenues) are Embassy Pictures Corp. ("Embassy", formerly "Avco Embassy") and Orion Pictures, Inc. ("Orion", formerly Filmways, Inc., "Filmways").

Although the structure of the distributor network varies somewhat from distributor to distributor, major distributors and some of the prominent independents generally market their pictures through nationwide marketing networks consisting of branch, district, and regional offices, each having responsibility for distribution in a particular geographic area. The distributors are responsible for planning and financing national, regional, and local advertising campaigns and promotional efforts in regard to the exhibition of their films. At the national level, the distributors assume the full cost of such efforts. At the local levels, the distributors pay most of the advertising costs during the early weeks of a film's exhibition, although the exhibitors also contribute.

Motion pictures are licensed (rather than sold) to exhibitors by distributors on a picture-by-picture, theatre-by-theatre basis in each local market. License agreements for the exhibition of pictures generally include, among other things, percentage terms for film rental, specific playdates and length of playtime (including holdover provisions). The agreements may also include guarantees and advances.

The percentage terms for film rental generally provide for the distributor to receive a percentage of the gross or net box office receipts. Typical percentage rental terms are calculated on the basis of "90/10 versus the floor." Under this formula, the exhibitor pays to the distributor for each week of playtime the higher of (a) 90% of the gross box office income after the theatre's "house allowance" has been deducted or (b) a percentage of the gross box office without any deductions (the "floors"). A typical rental provision in Milwaukee for an eight-week long run might be as follows: the first two weeks at 70%; the second two weeks at 60%; the third two weeks at 50%; the fourth two weeks at 40%; and a holdover provision of 35% for each holdover week.

A guarantee is a minimum film rental payment that the exhibitor promises to pay the distributor regardless of the amount of film rental earned under the percentage rental terms in the contract. In the event that the film rental earned under the percentage rental terms in the contract exceeds the amount of the guarantee, the film rental earned in excess of the guarantee is also paid to the distributor. A guarantee is generally paid prior to a film's exhibition. An advance is an advance payment of film rental which is applied against the film rental actually earned under the percentage rental terms of the contract. Unlike a guarantee, any portion of the advance not earned under the percentage rental terms in the contract is refunded or credited to the exhibitor. The existence of guarantees or advances in a

license agreement is important to a distributor's decision to award a film license.

Guarantees are important to distributors in a number of respects. As indicated above, if the percentage film rental is less that the amount of the guarantee, the distributor still receives the guaranteed film rental. In effect, the guarantee is a method by which the exhibitor shares with the distributor some of the risk inherent in producing and distributing motion pictures. Guarantees are also important to distributors because, as advance payments, they allow a distributor to recoup part of its investment before a picture is actually exhibited. In addition, guarantees assure prompt payment from exhibitors, who sometimes withhold portions of amounts due under a license agreement if a picture does not do particularly well at the box office.

The first exhibition of a motion picture in a market is referred to as its "first-run." Subsequent runs of pictures in the same market are known as "sub-runs." However, certain pictures (often classics such as Walt Disney's "Fantasia" and "Bambi") are re-released from time to time and are treated as first-run pictures.

Distributors frequently inform exhibitors of the release of new films by exhibitor solicitation letters. Such letters typically contain a synopsis of the film, the director and cast, the film's release date, the date bids are due, and suggested minimum terms. Often a distributor's suggested terms are called "national terms," meaning that the terms suggested are the same nationally for similar local markets. [1]

The manner in which film licenses are awarded may vary from market to market or from time to time in any particular market. In some markets, licenses are awarded through a process of bidding, in which competing exhibitors

[1] Of the major distributors, only Universal does not suggest minimum terms.

submit bids for the right to play particular films at particular theatres. Often this bidding process results in a distributor awarding a license which provides for terms which exceed those suggested in solicitation letters. Sometimes film licenses are awarded through a process of competitive negotiations. Rather than solicit bids, a distributor will negotiate with more than one exhibitor for the right to play a particular film. By industry custom, licenses awarded by bidding or by competitive negotiation are not subject to "adjustment," *i.e.*, the downward adjustment of rental owed by the exhibitor after the picture has played and not done as well as expected at the box office. Licenses which are not subject to adjustment are considered in the industry to be "firm." In some instances, film licenses are awarded by noncompetitive negotiation. This is the case in so-called "closed towns," *i.e.*, markets in which only one exhibitor has theatres. Where noncompetitive negotiations occur, license terms generally are not firm but rather are subject to adjustment. [2]

In any given exhibition market, certain theatres may be considered superior in terms of grossing potential. Sometimes distributors believe that they can obtain the best playoff of their pictures by establishing relationships with particular exhibitors who will play most or all of their films. Distribution of films in this matter is known as a "track" system. Track systems exist in a number of motion pictures exhibition markets around the country.

Often films are licensed before a print is available to be "trade screened" for exhibitors. In such instances, exhibitors must make offers on a film based on available information, which might include a description of the plot and the names of the actors, the director, and other key personnel involved in making the film. This type of licensing is known as

[2] Universal has a policy against granting any adjustments. Evidence presented at trial suggested that such policy could hinder the distributor's ability to license films at better theatres in a market in which exhibitors split pictures.

"blind bidding" and is, to say the least, extremely unpopular with exhibitors. Twenty-three states have enacted anti-blind bidding statutes which preclude distributors from licensing films before they are trade screened. Such legislation is presently the subject of constitutional challenge.[3]

The peak seasons for motion picture attendance are the summer and holidays. During such periods, there is intense competition among distributors to obtain what they believe to be the better theatres in a given market. Better quality films are released during the peak seasons. At other times during the year, there are not as many good films available, and thus competition among exhibitors becomes more intense for the good product available.[4]

The Court now turns its attention to the first-run motion picture exhibition market in Milwaukee, which is the focus of this lawsuit.

II. THE MILWAUKEE MARKET

Milwaukee County and the Eastern part of Waukesha County make up the Milwaukee motion picture exhibition market. In the Milwaukee market there are five exhibitors who operate regular first-run theatres. Four of those exhibitors are the defendants; the fifth is General Cinema, which operates only two first-run theatres (the Brookfield Square and the Westlane), which have a total of four screens. General Cinema is the nation's largest exhibitor, operating almost 1000 screens. Defendant UATC is the second largest, having interests in almost as many screens nationwide as General Cinema. UATC operates six theatres in Milwaukee, four of which (the Northridge, Southridge, Southgate, and

[3] Wisconsin does not have an anti-blind bidding statute.

[4] There was conflicting evidence presented at trial concerning whether there was a shortage of motion pictures for the exhibitors in Milwaukee to play. The fact that eight new first-run screens were opened in Milwaukee by the defendants immediately prior to the formation of the present split tends to undermine the defendants' claim that there was a severe shortage of films.

Mayfair) can be considered first-run. UATC's first-run screens in Milwaukee total eleven. Defendant Marcus operates over 50 theatres around the State of Wisconsin, twelve of which are in Milwaukee. Of those twelve, four can be considered first-run (the Northtown, Southtown, Capitol Court and Skyway, which have a total of eleven screens). One other Marcus theatre in Milwaukee (the Prospect Mall) plays first-run films only occasionally. Defendant Capitol Service operates eight theatres in Madison, Wisconsin and licenses films for five theatres in Milwaukee, some of which it also operates. Of the five, three can be considered first-run theatres (the Brownport, Mill Road, and Spring Mall, which have a total of eight screens). The other two theatres for which Capitol Service licenses films in Milwaukee (the Fox Bay and Downer) occasionally play first-run films. Defendant Kohlberg operates over 20 theatres in Illinois, Indiana, Michigan and Wisconsin. Three of these theatres are in Milwaukee, only one of which (the Point) is considered to be a first-run theatre. The Point has three screens. Government Exhibit (GX) 3 accurately depicts the first-run theatres in Milwaukee.

Since 1975, most motion pictures have been offered for first-run exhibition in Milwaukee on a multiple-run basis, meaning that a picture is licensed to more than a single theatre for a particular run. Generally, as part of the license agreement, a theatre is given a "clearance" over other theatres in the same geographic area. Thus, for example, if a popular film such as "The Empire Strikes Back" is licensed to play at the Northtown, the distributor will agree not to license the film to the Northridge, the Mill Road, and the Brownport. All of those theatres are considered to be in the same geographic zone.

In addition to the first-run theatres operated in Milwaukee by the four defendants and General Cinema, there are a number of outdoor theatres (drive-ins) which sometimes play

first-run films but, for the most part, do not compete with the first-run indoor theatres because they draw a different type of customer. There are also a number of sub-run theatres which play predominantly films which have already completed a first-run or so-called "exploitation" films (e.g., films featuring "kung fu," horror films, or other low-quality films that enter and exit the market quickly).

The present split agreement entered into between the defendants in this action in 1977 (described more fully below) was preceded by a period in which the licensing of first-run films in Milwaukee was characterized by extensive competitive bidding among exhibitors. During that period, there was no split agreement in effect. Prior to this bidding period, the licensing of first-run films in Milwaukee was governed by an "arrangement," the details of which are in dispute. The defendants contend that the arrangement was a track system. However, the credible evidence presented at trial indicated that the earlier arrangement was a distributor-by-distributor split, meaning that the exhibitors allocated among themselves the right to negotiate with particular distributors for the licensing of films at particular theatres. This arrangement collapsed in 1975 when Capitol Service licensed the film "Lucky Lady" outside the terms of the split agreement.

With the collapse of the distributor-by-distributor split, the first-run exhibition market in Milwaukee became a bidding market. Distributors would send out bid solicitation letters to the various exhibitors, and the exhibitors would independently respond to the solicitations with bids which often exceeded the suggested terms contained in the solicitation letters. This was not the case with every film. Some films were licensed by negotiation, even after bids had been submitted by various exhibitors. And some distributors demonstrated a particular affinity for licensing their films at certain theatres. But for the most part, on those films

perceived by the exhibitors to be potentially high-grossing films, competitive bids were submitted. Exhibitors competed by bidding for pictures to play at theatres which competed for business in the same geographic zones. A substantial proportion of the films licensed during this period were awarded by competitive bid.

The characteristics of the bidding period are highlighted by various admissions made by representatives of the defendants. Arnie Lewis, film buyer for UATC, testified during trial regarding the strategy involved in bidding on pictures:

Q. Mr. Lewis, if opposition theaters were not booked, you took that into consideration in deciding whether to bid; is that correct?

A. That is correct.

Q. So, you took into consideration whether they might be submitting a bid on a picture that you were interested in having; is that correct?

A. I had to assume that if they weren't booked in some instances like myself they would be bidding and in some instances like myself they would be trying to negotiate for a picture.

Q. And if you were interested in getting a film and you knew your opposition theaters were not booked for that time period, you would submit a bid?

A. Based upon our appraisal of that picture.

Q. That is, if you thought it was a good picture?

A. If we thought it was a good picture on occasion we would submit a bid.

(TR. 2488-89). John Bischof, film buyer for Kohlberg, testified during his deposition:

Q. But, you don't give them a higher guarantee than they asked for today under this?

A. That's correct.

Q. But, before the split you would?

A. Before that, yes. They were looking for more money or you went after a picture and you knew that the other party was giving a certain amount. Then you knew you had to wind up going higher than they did.

Q. You are referring to the other party?

A. Well, meaning one of the other theatre owners.

Q. So, you're saying before the split and putting in the guarantee, you took into consideration the fact that other exhibitors would be submitting bids?

A. Yes.

(Bischof Rule 30 Dep. at 33.) Angelo Porchetta, Capitol Service's vice-president and film buyer explained during trial the effect that bidding had on the terms offered for films by competing exhibitors:

> We tried to get them as cheap as we could, but you never knew how your opposition felt about the picture. You had no idea if he was going to go crazy for the picture or not. Now, I would start moderately, then if I was losing three, four, five, six pictures in a row, I would start panicking, I would figure I have got three screens in the Mill Road, Christmas is coming, what am I going to play.
>
> I still saw my opposition had three, four, five, six screens open, so he would be fighting to fill in his screens, so I started jacking up my guarantees.

(Tr. 3038-39.)

As the Court will discuss in Part III of this opinion, it was the exhibitors' concerns regarding price competition among themselves (including the "jacking up" of guarantees) which led to the present split agreement in Milwaukee. Suffice it to say for now, however, that during the bidding period prices (*i.e.*, the terms offered by exhibitors for motion

picture licenses, including percentage terms, playtime, guarantees, and advances) were substantially influenced by the existence of competitive bidding among the exhibitors.

III. THE MILWAUKEE SPLIT

There is no dispute in this case that the defendants are involved in a split agreement which affects the manner in which first-run motion pictures are licensed in Milwaukee. On November 30, 1977, representatives of each defendant met at the O'Hare Hilton near Chicago and agreed to form a split and established a procedure by which the split would operate. Under the agreement, the defendants have grouped their theatres that primarily exhibit first-run motion pictures into three units of eleven screens each. On occasion, some of the defendants' theatres that are not included in the three units have been split pictures under the split agreement. Under the agreement, Marcus and UATC each constitute one unit since each has eleven primarily first-run screens in Milwaukee. Capitol Service, which has eight primarily first-run screens, and Kohlberg, which has three primarily first-run screens, together form the third unit. The defendants meet periodically or converse by telephone to split pictures.

The split is a "picture-by-picture" split, meaning particular films are allocated to specific theatres. The exhibitors take turns selecting films for their respective theatres, making sure that no two theatres in the same geographic zone play the same film. Because General Cinema, which is not involved in the split, has two first-run theatres in Milwaukee, the defendants will sometimes "split around" the General Cinema theatres, meaning that they leave a run of the picture open in the event one of General Cinema's theatres obtains a license for the picture.

The above description of the Milwaukee split is undisputed by the parties. The parties disagree, however, in

regard to other aspects of how the split operates. The Court will discuss these below, but first it examines the defendants' purpose in entering into the split agreement.

A. The Defendants' Purpose

The record before the Court is replete with damning admissions by the defendants with regard to why they entered into the present split agreement. The defendants offered at trial a number of reasons why they initiated the split, but the credible evidence presented leads the Court to conclude that the defendants were motivated by an anticompetitive purpose.

The Government asserted at various times during the trial that the pretrial deposition testimony of various representatives of the defendants admitted into evidence was the heart of its case. The Court would agree that these various statements by the defendants are the strongest indication of the defendant's purpose in splitting pictures. [5]

Ben Marcus, the president of Marcus Theatres, made numerous statements in regard to his dissatisfaction with competitive bidding which show that he felt the prices exhibitors had to pay were unreasonable:

> Q. Can you describe some of the circumstances leading up to Marcus Theatre's decision to resume splitting in '77?

[5] The only evidentiary matter left open at the end of trial concerned the defendants' submission of counter-designations to the Government's deposition extracts. The parties were not able to resolve all disputes regarding admissibility, as indicated in their letters to the Court dated March 29, 1983 and April 8, 1983. The Court has examined the defendants' counter-designations (DX 717), including those to which the Government objects, and concludes that their admission into evidence does not affect the Court's decision.

A. Yes. Well, we were bidding for a product and it became so intolerable we just couldn't pay our bills any more. The film—the extortion of the terms that they got from us was impossible . . . .

(Marcus Civil Investigative Demand (CID) Dep. at 20.) Again, Marcus:

Q. But before the split did you not sometimes have to exceed national terms?

A. Well, when you bid—

Q. When you bid.

A. Sure. When you bid and if you want a picture you can—maybe the picture might do some business for you. You go crazy.

Q. You do exceed national terms then?

A. You have those God damn guarantees that kill you . . . .

(Marcus Rule 30 Dep. at 32-33.) Marcus used colorful language to describe the effect of the bidding process on exhibitors, including "murder" (CID Dep. at 30), "rape" (CID Dep. at 30), "extortion" (CID Dep. at 20), and "cremat[ion]" (CID Dep. at 25). Marcus also explained the motivation for the split:

[T]he film companies were winding up with all the money, and we've got to save ourselves from disaster. And after it got good and bloody, it [sic] decided to sit down and make a split again. Each one of them takes certain pictures and show them in the theatres.

(Marcus CID Dep. at 15-16.) Marcus went on to testify:

Q. Do you recall any conversation with any of the other exhibitor representatives in which they told you that they were getting murdered in Milwaukee?

A. I—I know all our buyers were crying on each other's shoulders, all saying they were getting murdered.

Q. At the meeting?

A. It was no secret.

Q. Was that because of the terms?

A. That's what brought the meeting about. Especially when we're getting raped. We're trying to see if we can stop this raping.

Q. Were other solutions proposed at this meeting?

A. None. The only solution we know would be a split.

(Marcus CID Dep. at 30-31.)

Representatives of the other defendants expressed similar views regarding why the split was needed. Angelo Porchetta of Capitol Service substantially confirmed during his Rule 30 deposition the accuracy of a statement attributed to him in the May 6, 1980 *Wall Street Journal* regarding the reason for the split: "We couldn't afford the ridiculous deals and guarantees it took to out bid the other guys." (Rule 30 Dep. at 72.) Capitol Service's president, Dean Fitzgerald, described the benefits expected from splitting in a memorandum dated December 8, 1978:

> As background, product splits are nearly as old as the business and are very effective as a marketing tool to provide for even distribution of product and to avoid overpayment excesses that exist in open bidding.

(GX 39.) In a later memorandum, Fitzgerald explained the purpose of splitting as follows:

> It was clearly set forth that the base cause of the split was not to prevent payment of requested terms of the film companies but to prevent overpayment of unrequested terms. Overbidding on a product where you cannot measure its worth is the inevitable consequence

of the open bidding process and the exhibitors cannot protect themselves against it.

(GX 41.) John Bischof of Kohlberg acknowledged during his CID deposition that one of the problems with bidding was the necessity for competing exhibitors to "go a little overboard on bidding" (Bischof CID Dep. at 42-43).

In addition to the foregoing admissions made by the defendants, there was credible testimony presented at trial by various representatives of the distributors in regard to statements made to them by the defendants about the purpose of the split. For example, Juanita Dyskterhuis testified that representatives of each defendant told her the split was entered into to avoid excessive guarantees. (Tr. 3236.) Charles Good of Buena Vista recalled a similar statement having been made by Ben Marcus (Tr. 1272), as did Paul Silk of Orion (Tr. 840). Carol Sutter of Buena Vista testified that she heard Ben Marcus tell the audience at a luncheon that the Milwaukee theatres had entered into the split to avoid paying too much film rental, high guarantees, and unreasonable playing time. (Tr. 1125.)

Such statements by the defendants can lead the Court to no other conclusion but that the Milwaukee split was entered into by the defendants for the purpose of eliminating competition among themselves. The testimony offered at trial on behalf of the defendants regarding their reasons for entering into the split simply lacked credibility given the admissions made prior to trial. Thus, the Court does not believe that the split was entered into simply to provide a more orderly method of distribution of films or to provide better access to popular films for the movie-going public. Nor does the Court believe that the split was formed as a method of dealing with the evils of "blind bidding." There was evidence presented at trial indicating that the defendants split not only films which they have not seen (*i.e.*, those which have not been trade screened), but also films which they have seen (such as

some of the Walt Disney films re-released from time to time by Buena Vista). While the Court would agree that blind bidding presents greater risks for exhibitors and thus is undesirable from their standpoint, the record before the Court reveals that the defendants' overriding concern was the "excessive terms" obtained by the distributors through the competitive bidding process, not simply the risks involved in blind bidding.

The Court now turns its focus to the manner in which the Milwaukee split has operated.

B. How the Split Operates

At the beginning of Part III, the Court described some of the basic attributes of the Milwaukee split which are uncontested by the parties. The Government contends that, in addition to their agreement regarding the basic mechanics of the split, the defendants have entered into three fundamental agreements which facilitate the split's anticompetitive purpose: (1) an agreement not to bid on pictures; (2) an agreement not to negotiate for a picture until it is split; and (3) an agreement not to negotiate for a picture split to another exhibitor. The defendants maintain that none of these agreements exist. They assert that the split does not preclude exhibitors from submitting competitive offers and that exhibitors will, in fact, negotiate with distributors for licenses outside of the split. According to the defendants, the split does not lock distributors into playing their films at particular theatres. All the split does, maintain the defendants, is allocate among exhibitors the "right of first negotiation" for the films split. As the Court discusses below, however, the so-called "right of first negotiation," even as described by the defendants, [6] is an impediment to price

[6] When asked during trial how long the "right of first negotiation" for a film would last, Michael Kominsky of Marcus could state only that it lasted a "reasonable amount of time." (Tr. 2961-62.) The response tends to show how little substance there is behind the defendants' phraseology.

competition in the market. The evidence strongly supports the Government's contention regarding the existence of the three agreements noted above.

1. The Agreement Not to Bid

A number of statements made by representatives of the defendants in pretrial depositions and at trial indicate that an essential term of the split is an agreement not to engage in competitive bidding. Ben Marcus admitted during his CID deposition that the essence of the split was to eliminate bidding (CID Dep. at 75) and that the exhibitors are no longer bidding in Milwaukee (CID Dep. at 57.) He testified during trial that, after the split began, the exhibitors would simply discard the bid solicitations sent by distributors to exhibitors. (Tr. 3737.) Arnie Lewis of UATC testified during his CID deposition that exhibitors in Milwaukee do not bid on pictures anymore because of the split agreement. (CID Dep. at 54.) He also testified that, after the split took effect, the exhibitors would respond to bid solicitations with letters indicating they were willing to negotiate for pictures. (CID Dep. at 142.) At trial, Lewis testified:

> Q. Mr. Lewis you don't bid in Milwaukee because of the split agreement, isn't that a fact?
>
> A. Correct.

(Tr. 2514.) Angelo Porchetta of Capitol Service, while stating that he might bid against General Cinema, testified in his Rule 30 deposition that split members would not bid against another member who had been allocated a picture for a particular zone. (Rule 30 Dep. at 85-87.) Michael Kominsky, Marcus' film buyer, testified in his CID deposition:

> If we were going to have an arrangement like this [a split agreement] none of us would be responding to a bid. I, myself, would always send a letter to negotiate on most of the films that I wanted to negotiate on.

(Kominsky CID Dep. at 34.)

At trial, representatives from the distributors testified to other statements made by the defendants which further support the Government's contention that an essential element of the split has been an agreement not to bid on pictures. The Court will not go into any detail regarding these statements but would simply cite the credible testimony of Buena Vista's Carol Sutter (Tr. 1130), and Embassy's William Shields (Tr. 2026). In addition, a memorandum sent by Angelo Porchetta to Paul Silk (then of Avco Embassy) in May 1978 indicates that defendant Capitol Service had ceased bidding. (GX 120.)

In addition to statements made by the defendants, the Government presented statistical evidence showing that bidding declined dramatically in Milwaukee after the split took effect. For the years 1976 through 1981, the number of bids submitted by the defendants' indoor theatres to the seven major distributors, Filmways, and Embassy were as follows:

Year	No. of Pictures Upon Which Bids Submitted	No. of Bids
1976	68	322
1977	74	317
1978	4	5
1979	2	12
1980	1	1
1981	0	0

(GX 6; GX 8.)

The defendants do not contest the fact that the number of bids decreased, but instead assert that there is no evidence that the split caused the decline in bids. They contend that it was not the split which curtailed bidding but rather the distributors' own policies. But the testimony presented at trial by various distributors' representatives was unanimous in regard to the distributors' affinity for bidding. The distributors continued to solicit bids after the split began, but the

bids stopped coming.[7] The defendants contend that if the distributors would have "insisted" on bidding with regard to any particular film, bidding would have occurred. They cite as their basis for this contention the number of bids received for the picture "Star Trek" in 1979. But the circumstances surrounding the licensing of "Star Trek" were somewhat unusual.[8] Moreover, there were discussions among the defendants in regard to whether bids would be submitted for the film. Thus, the fact that defendants on occasion submitted bids does not mean the split agreement had no effect on bidding. Given the various statements made by the defendants indicating that an essential part of the split was the elimination of bidding, it is more than reasonable to infer from the Government's statistical evidence that the reduction in the number of bids was caused by the split.

The defendants also contend that the Government failed to introduce any evidence that a term of the split was an agreement not to bid for pictures. There was testimony on

[7] Representatives of the defendants testified at trial that the bid solicitation letters were simply the method used by the distributors to inform exhibitors of new releases. Distribution company witnesses testified that they continued to solicit bids after the split was formed. This evidence was presented in regard to the defendants' contention that, early on, the distributors (or at least some of them) agreed to go along with the split and at least try it. (*See e.g.*, Marcus testimony, Tr. 3737.) At the time of trial, the defendants conceded that the distributors were opposed to the split (which became apparent when distributor witnesses testified). While the Court does not believe that the distributors' alleged acquiescence to the split in its early stages is material to the legal issues presented in this lawsuit, it does not, in any event, believe the defendants' testimony regarding the distributors' willingness to go along with the split. At best, the distributors were skeptical about the Milwaukee split from its inception.

[8] Paramount insisted on bidding with regard to "Star Trek." The film was expected to be a great success at the box office. Paramount succeeded in licensing "Star Trek" through bidding, although it took three rebids to accomplish the task. Moreover, the picture was licensed to the three theatres to which it was designated in the split (as well as to two other theatres as add-on runs). The one very large guarantee received ($140,000 from Marcus' Southtown) was the result of bidding in the same geographic zone between the Southtown and the Westlane, which is owned by General Cinema and is not a participant in the split.

behalf of the defendants (Marcus testimony, Tr. 3673) that no such agreement existed. It was not necessary, however, that the Government prove an express agreement. "It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement." *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 142, 68 S. Ct. 915, 922, 92 L. Ed. 1260 (1948). The Court believes that the evidence presented amply demonstrates an agreement among the exhibitors not to bid for films.

2. The Agreement Not to Negotiate For a Picture Until it is Split

Another fundamental term of the Milwaukee split which the Government has identified and proved is an agreement among the defendants not to negotiate for pictures until they have been split. The defendants' own admissions disclose the existence of such agreement. Arnie Lewis of UATC testified during his CID deposition:

> Q. Is it your understanding pursuant to the split that you will not submit an offer for a motion picture until that motion picture has been split?
>
> A. Yes.

(CID Dep. at 57-58.) Lewis testified similarly during his Rule 30 deposition. (Rule 30 Dep. at 76-77.) Michael Kominsky of Marcus gave similar testimony during his CID deposition:

> If they [the distributors] call and ask me where a picture is going I will tell them we haven't had a meeting on it if we haven't had a meeting to discuss the movie.

(Kominsky CID Dep. at 114.) Various representatives of the distributors gave testimony at trial regarding conversations in which the defendants indicated their unwillingness to license films until after the films were split, including Buena Vista's Sutter (Tr. 1126), Warner Bros.' Hite (Tr. 351-

52, 255-56), Columbia's Rudnitsky (Tr. 2074), and Universal's Miller (Tr. 1382).

The defendants presented testimony at trial regarding a recent change in the operation of the split which would allow films to be licensed before films are split or outside the split. As the Government points out, such change, even if genuine, should have no bearing on the grant of injunctive relief. See *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 333, 72 S. Ct. 690, 695, 96 L. Ed. 978 (1952). In any event, the Court has reason to doubt the genuineness of the change since licensing pictures outside the split would tend to frustrate the split's purpose and because the supposed change in policy came so close to the time of trial.

3. The Agreement Not to Negotiate For a Film Split to Another Defendant

The third fundamental term of the split identified and proved by the Government is an agreement among the defendants providing that one defendant not negotiate for films split to the other defendants. In this regard, it is necessary for the Court to examine the defendants' claim that all they really do in the split is allocate the "right of first negotiation" for particular films.

The "right of first negotiation" appears to the Court to be an empty phrase used by the defendant exhibitors to describe their agreement to negotiate only for the films allocated to their respective theatres. Once a batch of films has been split, the screens for a particular period of playtime are booked up. A distributor has little chance of entering into meaningful negotiations for the licensing of a film at a theatre other than the split designee because other theatres have been designated for other films.[9] This is not to say, however, that, under the split, films have always been

[9] Angelo Porchetta of Capitol Service touched on this point during his CID deposition:

licensed in accordance with the original designations made by the exhibitors. The defendants were able to point out at trial a number of instances in which a distributor unhappy with the theatre to which a particular film had been designated was able to license the film at another theatre. This would occur, however, through a process of accommodation among the exhibitors—a so-called "reworking" of the split. This accommodation by the exhibitors would not involve competitive negotiations; rather, the distributor would have only the exhibitor to whom the split was "reworked" to negotiate with.

The defendants assert that the split has not precluded exhibitors from engaging in competitive negotiations for films, and to prove this point, they introduced at trial evidence regarding several films that were licensed without being split to a particular theatre, including: "Poltergeist"; "Rocky III"; "Pink Floyd's The Wall"; "Yes, Giorgio"; and "Annie." All of these films were licensed close to the time of trial. Some of them were United Artists films which were licensed pursuant to an agreement by which United Artists would license its summer and fall product exclusively to Marcus and UATC.[10] These few examples of films licensed outside the split cannot obscure what appears to the Court to be a fundamental term of the split, *i.e.*, the understanding

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> In many cases, they will ask you what are you playing at that period and you tell them if you have your screens filled and that you are playing their picture and that, and the other—and you won't have room for his picture which is - which, in reality, is what happens when you allocate pictures, that you negotiate the ones that are allocated to you. You negotiate for first, assuming you are successful on your three screens or two or one, that ties up that play time.
>
> (Porchetta CID Dep. at 167.)

[10] In regard to the arrangement with UATC, United Artists' vice-president and assistant general sales manager, Buddy Golden, stated: "Although UA would have preferred receiving competitive offers from UATC and its competitors in Milwaukee, your present arrangements have precluded that possibility." (GX 188.)

among the defendants that they are to negotiate for only the films split to their respective theatres.[11]

C. The Effect of the Split on Competition

The Court has determined above that the defendants' purpose in entering into the current split agreement was to reduce competition in the licensing of motion pictures in Milwaukee. This section of the Court's opinion discusses the evidence which supports the Government's contention that the defendants have been successful in their efforts. The split has had the effect of reducing price competition among the defendants.

As already stated above, the split has reduced significantly the number of bids submitted by the defendants for motion picture licenses. Moreover, the evidence presented shows that the split has virtually eliminated the prospect of competitive negotiations for films, since the defendants generally do not negotiate for film split to other exhibitors unless there is a reworking of the split.

Probably the most dramatic effect of the split has been the reduction in the amount of guarantees paid by exhibitors in Milwaukee. Guarantees fell from $1,820,300 in 1977 to $913,000 in 1978 ($310,000 of which was paid for films licensed before the split) to $687,000 in 1979 to $265,000 in 1980 to $140,000 in 1981. (GX 10.) In its answer to interrogatory 20 of the Government's first set of interrogatories, defendant Marcus admitted that the reduction in guarantees is caused by the split:

> The [split] arrangement . . . has benefited exhibitors by eliminating the need, in most cases, to give large

[11] At trial, the defendants introduced into evidence letters sent from UATC to various distributors in which UATC stated that it was ready and willing to negotiate for the distributors' films. These letters were offered to show that the distributors, who did not respond to the letters, simply were not interested in competition. The tone of the letters, however, indicates that UATC was not interested in any real competition with the other exhibitors.

> guarantees to distributors for unseen, unproved motion pictures. . . .[12]

(GX 20 at 7.) Salah Hassanein of UATC testified at trial that distributors are able to obtain guarantees on a substantially larger number of films in bidding markets than in splitting markets. (Tr. 3917.) And Ben Marcus testified during his CID deposition that the split had benefitted his corporation because "[i]t stopped our losses by not paying out the extortion guarantees." (CID Dep. at 89.) Given these statements by the defendants, it is difficult to comprehend the defendants' present contention that the reduction in guarantees in Milwaukee is not the result of the split but rather of some national trend away from the use of guarantees.

Another effect of the split has been an increase in the number of downward adjustments in film rentals obtained by the exhibitors in Milwaukee. As noted in Part I of this opinion, adjustments in film rental terms generally are not given in markets in which competitive bidding or competitive negotiations prevail. This is because an expectation in such markets that adjustments will routinely be given would tend to distort the bidding and negotiation processes. One of the benefits which the defendants in the instant case expected to obtain as a result of splitting was greater ability to obtain adjustments in rental terms. Ben Marcus testified during his CID deposition that one of the benefits of the split to his corporatin has been the ability "to negotiate the adjustments for some of the pictures." (CID Dep. at 89.) The testimony of various distribution company witnesses indicated that a result of the split has been an increase of the number of films subject to downward adjustment. (Tr. 106-

[12] The defendants assert that fewer or smaller guarantees were required because with more runs of a film, clearances would necessarily be smaller, thus obviating the necessity for large guarantees. Yet, even under the defendants' theory, one would expect more smaller guarantees to correspond with the greater number of smaller clearances. One would not expect the overall amount of guarantees paid to decline as sharply as it did. (See GX 9, GX 10.)

110; 397-400; 553-54; 827-29; 1007-08; 1131-32; 1304-05; 2094-95; and 2140-43.) This increase in the number of downward adjustments was made possible by the defendants' elimination of competitive bidding and competitive negotiations through the split agreement. As defendant Marcus stated in its answer to interrogatory 20 of the Government's first set of interrogatories:

> The [split] allowed the exhibitors to renegotiate the film rental terms with a distributor when a film did not do as well as expected at the box office.

(GX 20 at 7.)

Another aspect of motion picture licensing affected by the Milwaukee split is the length of playtime for which films are licensed. The defendants have admitted that the split has achieved a general reduction in playtime: "[T]he [split] procedure tends to result in more, shorter runs for a particular film." (GX 20 at 10.)

Each of the above-noted results of the split affects the price paid for films. Guarantees are a component of the overall price paid to license films. They are particularly important when a film does not do well at the box office. In such instances, the distributor is able to recoup part of its investment in the film. But even where a film does well and the percentage rental terms provide the distributor with an amount greater than the amount of the guarantee, the guarantee still has economic value to the distributor because it is an advance payment. Adjustments directly affect the total amount of rental paid for a particular film. The ability of the defendants to obtain adjustments (made possible because of the leverage created by the split) necessarily has an effect on price. Playtime is an important component in establishing the overall price paid for a film because the longer a particular film plays, the more revenue it generates. And even if the shorter playtime resulting from the split coexists with more runs of a particular film, there is nonetheless a

predictably adverse effect on the distributors. For one thing, film prints are expensive, and more runs of a particular film mean more prints. More important, however, is the fact that an increased number of runs in a market such as Milwaukee makes it less likely that a distributor will receive rental payments based on the "90/10" formula as opposed to the "floors" (see Part I, *supra*). Thus, decreased playtime, even with more runs of any particular film, has a predictable effect on the price paid to license films, as do fewer guarantees and more adjustments.

Given the strong evidence presented by the Government regarding the anticompetitive effect of the split, the Court will touch only briefly the defendants' evidence concerning the effect of the split. In addition to arguing that the Government failed to introduce any evidence that the split has reduced overall film rental paid by the defendants to distributors,[13] the defendants contend they have proved that the split has not had an adverse effect on the overall film

[13] At various points during the trial and in their post-trial briefs, the parties have argued whether the Government must prove the split's anticompetitive effect in order to establish illegal price fixing. The defendants assert that the Government failed to meet its burden by not introducing any evidence concerning the split's effect on the overall price (measured as a percentage of box office receipts) paid by the defendants to distributors. The Government had intended to introduce into evidence a rebuttal exhibit for the purpose of establishing such effect. However, when the Court ruled that the defendants were entitled to conduct discovery regarding the exhibit prior to its admission into evidence, the Government withdrew the exhibit for the stated reason of expediting a decision on the merits.

The often-quoted footnote 59 in *Socony-Vacuum* leaves little doubt that, where price fixing is involved, liability under Section 1 may be established without proving both a purpose and a power to fix prices. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-25 n.59, 60 S. Ct. 811, 844-46 n.59, 84 L. Ed. 1129 (1940). "[I]t is well established that a person 'may be guilty of conspiring although incapable of committing the objective offense.'" *Id.* (quoting *United States* v. *Rabinowich*, 238 U.S. 78, 86, 35 S. Ct. 682, 684, 59 L. Ed. 1211). *See also, McClain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232, 243, 100 S. Ct. 502, 509, 62 L. Ed. 2d 441 (1980). It seems only sensible, however, that where an agreement is alleged to fix prices only indirectly, there must be some evidence or at least an obvious connection linking the challenged arrangement to price. Thus, in order to prove an arrangement falls within the *per se* category called "price fixing," it is necessary to show

rentals paid to distributors. The defendants rely principally on the following evidence: (1) GX 275, a study of film rentals paid by UATC's Milwaukee first-run theatres; (2) the testimony of UATC's Arnie Lewis; (3) the testimony of Ben Marcus; (4) Defendants' Exhibit (DX) 509, a study of film rentals UATC paid in the last two years in Milwaukee, Minneapolis-St. Paul, and its entire eastern division of the United States; and (5) the testimony of UATC's Salah Hassanein. The Court will not discuss in detail why such evidence does not support the defendants' contentions. Briefly stated, there are numercus factors which may affect overall film rental paid by exhibitors to distributors in different motion picture exhibition markets or within the same market over time. Such factors are not taken into account adequately by the defendants' evidence. Moreover, the Court perceives the defendants' evidence regarding increased rental payment to be in part an attempt to establish the reasonableness of the film rentals paid by the defendants to distributors. This is not the focus of the Sherman Act; [14] rather, the Sherman Act ultimately is concerned with the effect of a particular practice on competition. The Government has amply proved the effect in the instant case.

IV. THE MILWAUKEE SPLIT IS PER SE ILLEGAL

As enacted by Congress, Section 1 of the Sherman Act literally prohibits "every" agreement in restraint of trade. 15 U.S.C. §1. The Supreme Court has interpreted the statute, however, to condemn only *unreasonable* restraints, and thus, since its decision in *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 2d 619 (1911), the

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in some way that price is affected. The Court believes that the Government has adequately demonstrated such effect on price in the instant case.

[14] "Whatever reasonable justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness." *United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. at 226 n.59, 60 S. Ct. at 846 n.59.

Court has analyzed most restraints under the so-called "rule of reason." Under the rule of reason, the inquiry is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Bd. of Trade* v. *United States,* 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683 (1918). In applying the rule of reason, the trier of fact must weigh the pro- and anticompetitive effects of a challenged restraint to determine whether it is unreasonable. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49-50, 97 S. Ct. 2549, 2557, 53 L. Ed. 2d 568 (1977).

Certain business relationships have been determined to be so plainly anticompetitive that an elaborate analysis of their competitive virtues is not required. Such restraints are said to be "illegal *per se.*" Once a court has determined that a particular practice is governed by the *per se* rule, it need not engage in the lengthy balancing inquiry required by the rule of reason. However, the *per se* rule is not simply a substitute for analysis but instead a rule of judicial experience which enables a court to predict with confidence that the rule of reason would condemn a particular practice. It is a "conclusive presumption that the restraint is unreasonable." *Arizona* v. *Maricopa County Medical Society,* 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982). Even in a case in which a challenged restraint is determined to be illegal *per se,* the Court must analyze the circumstances of the restraint to determine whether it is among those business practices which warrant the conclusive presumption of unreasonableness. *See, generally,* P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* (Federal Judicial Center 1981).

Among those agreements which have been found to be unlawful in and of themselves are price fixing and division of markets (market allocations). *See Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958). In the instant case, the Government asserts that the

defendants' split agreement constitutes both a price-fixing and a market allocation agreement. As such, the government contends that the split must be condemned as *per se* unlawful. The defendants maintain that the split agreement must be analyzed under the rule of reason and accordingly offered evidence at trial regarding alleged procompetitive benefits produced by the split. The Court discusses below why these alleged benefits must be rejected and why the split is a *per se* illegal restraint of trade.

A. Price Fixing

The Supreme Court has recognized since *Standard Oil* that inquiry under the rule of reason ends once a price-fixing agreement is proved. As the Court stated in *United States* v. *Trenton Potteries,* 273 U.S. 392, 47 S. Ct. 377, 71 L. Ed. 700 (1927);

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

Id., at 397-98, 47 S. Ct. at 379-80.

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940), the Court concluded that an agreement among competitors which indirectly fixed prices was *per se* unlawful. In that case, major oil refiners engaged in a concerted effort to purchase and store surplus gasoline in order to maintain stable prices. The defendants argued that the agreement was necessary to avoid cutthroat competition. The Court stated:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

Id. at 221, 60 S. Ct. at 843.

Two more recent Supreme Court decisions involving price fixing are of particular importance to the instant case. In *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978), an agreement among competing firms of professional engineers to refuse to discuss prices with potential customers until after negotiations resulted in the initial selection of an engineer was held unlawful without requiring further inquiry into the reasonableness of the restraint at issue. The agreement operated as a ban on competitive bidding. While noting that the agreement was "not price fixing as such," the Court determined that no elaborate industry analysis was required to demonstrate the anticompetitive character of such an agreement. *Id.* at 692, 98 S. Ct. at 1365. The agreement was held to be "[o]n its face" a restraint of trade within the meaning of Section 1 of the Sherman Act.[15] *Id.* at

[15] Throughout the litigation, the defendants have argued that *National Society* is not a case involving application of the *per se* rule. Although Justice

693, 98 S. Ct. at 1366. In *Catalano* v. *Target Sales, Inc.*, 446 U.S. 643, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980), the Court held unlawful an alleged agreement among beer wholesalers to eliminate short-term credit to retailers and to require cash payments. The Court characterized credit terms as an "inseparable part of the price" and thus concluded that an agreement to terminate the practice of giving credit fell "squarely within the traditional *per se* rule against price fixing." *Id.* at 648, 100 S. Ct. at 1928.

National Society is instructive in the instant case in regard to the defendants' elimination of bidding as a method of licensing films. In *National Society,* the Court noted that the Society's ban on bidding " 'impedes the ordinary give and take of the market place,' and substantially deprives the customers of 'the ability to utilize and compare prices in selecting engineering services.' " 435 U.S. at 692-93, 98 S. Ct. at 1365-66 (quoting from the district court's opinion, 404 F. Supp. 457, 460). Essentially the same thing can be said in the instant case with regard to the split agreement's effect on the licensing of motion pictures. The split agreement, although not uniformly enforced by the defendants, has for the most part eliminated competitive bidding as well as competitive negotiations among the exhibitors in Milwaukee. By limiting the distributors' choices through allocation of new films to be released, the defendants have deprived the distributors of the ability to compare simultaneous offers to license their films.

The analogy to *Catalano* is even more direct. There, the Court held that an alleged agreement to eliminate one of the components of price (credit terms) was *per se* unlawful price

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Stevens did not actually state that the condemned restraint of trade was *per se* unlawful, the analysis applied was that of the *per se* rule. Subsequent decisions of the Supreme Court support this view. *See, Arizona* v. *Maricopa County Medical Society,* 457 U.S. 332, 102 S. Ct. 2466, 2483, 73 L. Ed. 2d 48 (1982) (Powell, J., dissenting); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647, 100 S. Ct. 1925, 1927, 64 L. Ed. 2d 580 (1980).

fixing. In the instant case, the Court has determined above that one of the purposes and effects of the defendants' split agreement has been a reduction in the amount of guarantees paid to the distributors. Guarantees, like credit terms, are an important part of the price paid to license films. The Court has also found above that the split agreement has affected two other aspects of price: the ability of the defendants to obtain downward adjustments and their ability to obtain shorter playtimes. Price is necessarily affected by the split agreement.

Of course, not every arrangement that affects prices must be condemned *per se* as "price fixing." *Arizona* v. *Maricopa County Medical Society,* 102 S. Ct. at 2482 (Powell, J., dissenting). In *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.,* 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979), the Supreme Court determined that blanket licensing of performance rights sold by copyright clearinghouses constituted "price fixing" in only the literal sense. The Court ruled that the legality of blanket licenses could not be determined under the *per se* rule because such licenses yielded substantial efficiencies that would not be realized through individual licensing. *Id.* at 20-21, 99 S. Ct. at 1562-63. In addition, the Court determined that the blanket license was "to some extent a different product." *Id.* at 22, 99 S. Ct. at 1563.

The defendants in the instant case rely on *Broadcast Music* as controlling. There are fundamental differences, however, between the blanket licenses challenged in *Broadcast Music* and the split agreement at issue here. First, the Supreme Court specifically noted in *Broadcast Music* the absence of any evidence that blanket licensing "ha[d] the effect, or could have been spurred by the purpose, of restraining competition among individual composers." 441 U.S. at 13, 99 S. Ct. at 1559. In contrast, this Court has determined that both the purpose and the effect of the defendants' split agreement has been anticompetitive in

nature. Second, as noted above, the Supreme Court in *Broadcast Music* characterized the blanket license as "to some extent a different product" than licenses granted by individual composers. The blanket license offered efficiencies which could not be obtained through the individual licensing of compositions. Although the defendants in the instant case contend that such efficiencies exist as a result of the split (discussed below), it is quite clear that the split in no way presents distributors with a "new product." Motion pictures continue to be licensed on a theatre-by-theatre basis. The split is simply not necessary to the existence of a market for the exhibitor of motion pictures. Unlike that blanket license, the split agreement can be "wholly equated with a simple horizontal agreement among competitors." *Id.* at 23, 99 S. Ct. at 1564. Finally, the Supreme Court in *Broadcast Music* noted the district court's finding that "there was no legal, practical, or conspiratorial impediment to CBS's obtaining individual licenses: CBS, in short, had a real choice." *Id.* at 24, 99 S. Ct. at 1564. Although the defendants in the present case can point to instances in which distributors have been able to license films outside the split, the understandings which exist among the defendants (described in Part III B, *supra*) preclude the distributors from exercising a "real choice" in the licensing of films in Milwaukee.[16]

The differences between the instant case and *Broadcast Music* serve to highlight why the defendants' split agreement must be condemned *per se* as price fixing. Yet the defendants would have this Court refrain from deeming the split a *per se* restraint of trade because the judiciary has not had enough experience with splits to warrant application of the *per se* label. They point out that there has been no chain of cases finding splits to be illegal and note that "the Supreme Court

[16] To the extent that the Seventh Circuit's decision in *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 1982-1 Trade Cas. (CCH) ¶ 64,632 (7th Cir. 1982), relies on the blanket license rationale of *Broadcast Music*, it is likewise distinguishable from the instant case.

has not added any new *per se* categories in years. . . ." (Defendants' Post-Trial Brief at 118.) They also argue extensively that the Justice Department's position for years that splits were not *per se* illegal is evidence of the potential procompetitive virtues of splitting.

The fundamental flaw in the defendants' argument is that the Government is not seeking to establish here a new *per se* category. A similar argument was rejected by the Supreme Court in *Arizona* v. *Maricopa County Medical Society, supra.* There, the defendant medical society urged that the *per se* rule should not be applied because the judiciary had had little antitrust experience with the health care industry. The Court stated:

> The argument quite obviously is inconsistent with *Socony-Vacuum.* In unequivocal terms, we stated that, "[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." 310 U.S., at 222, 60 S. Ct., at 843.
>
> * * * * * *
>
> Finally, the argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well are related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often fruitless when undertaken." *Northern Pac. R. Co.* v. *United States, supra,* 356 U.S. at 5, 78 S. Ct. at 518.

102 S. Ct. at 2476. The defendants argue that *Maricopa* is distinguishable because it involved direct (as opposed to

indirect) price fixing. The *per se* rule against price fixing, however, applies with equal force to arrangements which indirectly affect prices. *See, e.g., Socony-Vacuum, supra; National Society of Professional Engineers, supra.*

With regard to the Justice Department's prior position regarding splits, the Court would simply observe that the Justice Department is not given the ultimate responsibility for interpreting acts of Congress, including the Sherman Act. That responsibility is entrusted to the judiciary. Thus, even though a court might look to the Justice Department's official position with regard to a particular business practice as a factor in determining whether the practice falls within a *per se* category, *see Broadcast Music, Inc., supra,* 441 U.S. at 10-16, 99 S. Ct. at 1557-60, the Justice Department cannot formulate policies which are binding on the courts.[17]

The defendants also point to the district court's decision in *Greenbrier Cinemas, Inc.* v. *Attorney General,* 511 F. Supp. 1046 (W.D. Va. 1981), for the proposition that splits must be examined under the rule of reason rather than under the *per se* rule. *Greenbrier* was a declaratory judgment action brought by an exhibitor to challenge the Justice Department's contention in an April 1, 1977, press release that all splits are *per*

[17] The defendants contend that the Justice Department's position in the instant case is also inconsistent with its present position taken in an *amicus* brief filed in *Bd. of Regents of the University of Oklahoma* v. *National Collegiate Athletic Association,* 707 F.2d 1147 (10th Cir. 1983). In *NCAA*, the Government has urged the Tenth Circuit to examine the alleged price-fixing restraint (a restriction on NCAA members with respect to telecasting football games) under the rule of reason rather than under the *per se* rule. The Government's rationale for its position in *NCAA* is that a lawful joint venture such as the NCAA has legitimate needs that must be taken into account in analyzing conduct under the antitrust laws. The NCAA, unlike the Milwaukee split, depends upon cooperation among its members for the very existence of a market. Like the blanket license at issue in *Broadcast Music, supra,* the product involved in *NCAA*, *i.e.*, college football, is a new product which exists by virtue of the members' association.

The issue whether the restraint in *NCAA* is *per se* price fixing is not before this Court. However, the Court is satisfied that the distinctions between the instant case and *NCAA* are substantial enough to rebut any claim of inconsistency made by the defendants.

se illegal. After a trial on the merits, the court held that the Charlottesville, Virginia split had to be evaluated under the rule of reason instead of the *per se* rule.[18]

This Court will not attempt to distinguish or point out disputes it may have with the *Greenbrier* decision. That has been done concisely, and this Court believes, accurately in another case in which splits were held to be illegal *per se*, *General Cinema Corp.* v. *Buena Vista Distribution Co.*, 532 F.Supp. 1244, 1265-66 (C.D. Cal. 1982).[19] In his decision in *General Cinema*, Judge Kenyon provides several reasons why the reasoning in *Greenbrier* should not be followed. Suffice it to say that this Court believes the *General Cinema* decision provides a sounder analysis of splits and why they should be condemned *per se* as price fixing.

Because the Court in the instant case concludes that the defendants' split agreement falls within the "price fixing" category of *per se* violations, it need not weigh the evidence offered by the defendants in regard to the alleged procompetitive benefits achieved by the split.[20] In view of the defendants' purpose and the resulting effect of the split agreement

[18] The defendants assert that the doctrine of collateral estoppel precludes the Government from disputing the factual findings set forth in *Greenbrier*. The court does not believe the application of collateral estoppel is appropriate because there is not the requisite identity of factual issues.

[19] The *General Cinema* case has been settled by consent decree which, among other things, dissolves the court's permanent injunction prohibiting General Cinema from engaging in split agreements. However, the consent decree acknowledges that General Cinema now has a corporate policy against splitting and requires General Cinema to inform Buena Vista of any changes in that policy. (*See* Judgment of Consent dated January 31, 1983.) Moreover, in a subsequent decision denying a post-judgment motion to intervene, Judge Kenyon again expressed his view that splitting is a *per se* violation of the antitrust laws. (*See* Order dated April 20, 1983.)

[20] The defendants also cite as authority for application of the rule of reason several decisions in which vertical restraints were held to be lawful. *E.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977); Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982). These cases are distinguishable by virtue of the vertical nature of the restraints involved, as opposed to the purely horizontal arrangement at issue in the instant case.

on the price mechanism involved in licensing motion pictures, the split agreement is "conclusively presumed illegal without futher examination under the rule of reason. . . ." *Broadcast Music, Inc., supra*, 441 U.S. at 8, 99 S. Ct. at 1556. Nonetheless, the Court will consider briefly the alleged procompetitive benefits identified by the defendants.

The defendants claim the split has the effect of heightening competition among exhibitors, among pictures, among distributors, and among other forms of entertainment. They also assert that the split promotes efficiency in the licensing of films. The essence of all of their arguments in this regard is that a market governed by splitting is better than one which is characterized by bidding. They maintain that under the split, theatres have better pictures playing for longer periods in accordance with the demands of the public. By virtue of the flexibility provided by the split, argue the defendants, higher levels of attendance can be achieved and maintained. In addition, they contend that the less prominent distributors are able to obtain first-run theatres for their pictures. Such benefits, argue the defendants, were not obtainable under the "chaotic" system in which blind bidding prevailed. The distributors, of course, disagree with these assertions, as indicated by the testimony of various witnesses at trial.

The Court has serious doubts whether the assertions made by the defendants are factually accurate. But in any event, it is not the function of this Court to determine whether a system of splitting is better than one characterized by direct competition among horizontal competitors. "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 248, 71 S. Ct. 240, 249, 95 L. Ed. 239 (1951). "Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy [of the Sherman Act] precludes inquiry into the question whether competition

is good or bad." *National Society of Professional Engineers, supra,* 435 U.S. at 695, 98 S. Ct. at 1367. Thus, to the extent that the defendants assert that they have developed a system for licensing films which is more efficient than competition, they are without support in the law.[21]

Nor is there any legal support for the defendants' attempt to justify the split as promoting competition in areas other than the licensing of films. This type of argument was rejected by the Supreme Court in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972):

> If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking.

Id. at 611, 92 S. Ct. at 1135. Indeed, it would be virtually impossible for this Court to make a factual determination that the restraint on competition created by the split is outweighed by increased competition among theatres for audiences or among theatres and other forms of entertainment in the local market, such as the Milwaukee Brewers and Milwaukee Bucks.

Thus, the Court views the various alleged procompetitive benefits offered by the defendants to be immaterial to the Government's antitrust claim. While the defendants may have genuine business concerns with regard to blind bidding and its attending evils, such concerns are not the concern of this suit. As pointed out by the Government, the defendants

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[21] The various complaints the defendants have with respect to blind bidding sound of the "age-old cry of ruinous competition and competitive evils. . . ." United States v. Socony-Vacuum Co., *supra,* 310 U.S. at 221-22, 60 S. Ct. at 843. The defense of competitive abuses has never been allowed as a legal justification for price fixing. *Id.*

have every right to petition the state legislature to establish anti-blind bidding legislation similar to that in force in other states. They may not, however, resort to anticompetitive self help.[22]

In sum, the Court concludes that the defendants' split agreement constitutes price fixing which must be condemned as *per se* illegal under Section 1 of the Sherman Act. The defendants' purpose and the resulting effect on price justifies application of the conclusive presumption that the split unreasonably restrains trade. Moreover, the alleged procompetitive benefits offered by the defendants are not material under proper antitrust analysis. Thus, the split agreement would have to be condemned even under the rule of reason.

B. Market Allocation

As noted earlier, the Government contends that the Milwaukee split should be condemned *per se* not only as price fixing but also as an illegal market allocation.

Market allocation schemes among horizontal competitors have been held to be *per se* violative of Section 1 of the Sherman Act. See *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972). Such arrangements between competitors may be *per se* unlawful whether they allocate territories, customers, or products. *See* L. Sullivan, *Handbook on the Law of Antitrust* §81 (West 1977) at 219; *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078 (5th Cir.), *cert. denied*, 437 U.S. 903, 98 S. Ct. 3088, 57 L. Ed. 2d 1133 (1978). A market allocation agreement is unlawful whether engaged in by competing buyers or competing sellers. *See e.g., United States* v. *Champion International Corp.*,

[22] The Court cannot help opining that bidding on a film months in advance of play only because a given star or superstar is involved—without a real opportunity to know the details of plot, supporting cast, photography, special effects, standards of morality, etc.—does not seem to be a particularly discriminating way to select our national movie fare. But to assess artistic content is not the Court's function.

557 F.2d 1270 (9th Cir.), *cert. denied.*, 434 U.S. 938, 98 S. Ct. 429, 54 L. Ed. 2d 298 (1977).

The essence of a market allocation agreement is the horizontal competitors' agreement not to compete with one another in some designated area of trade, whether it be geographic or otherwise. Although it is possible certain procompetitive benefits of market allocations can be identified, the *Topco* decision makes clear that the *per se* rule is nonetheless applicable. *See* 405 U.S. at 596, 92 S. Ct. at 1126. Thus, once a market allocation among horizontal competitors has been identified, it is not necessary to carry the inquiry further. Moreover, it is not necessary that one prove a market allocation scheme has an adverse effect on competition. L. Sullivan, *Antitrust, supra* §80 at 217; *Cadillac Overall Supply Co., supra*, 568 F.2d at 1085; *Sport Shoe of Newark, Inc.* v. *Ralph Libonati Co., Inc.*, 512 F. Supp. 921, 923 (D. Del. 1981). However, anticompetitive purpose and effect may be pertinent to the characterization of a particular arrangement as a market allocation:

> As with price fixing, the basic guide is purpose and effect; if division of markets is the goal of the arrangement or the overriding effect, it should be characterized as market division even though it achieves that consequence quite indirectly.

L. Sullivan, *supra*, §81 at 219.

In his decision in *General Cinema, supra*, Judge Kenyon declined to hold that split agreements were illegal market allocations because the record before him on Buena Vista's summary judgment motion presented factual questions regarding whether splits eliminated *entirely* the competition for licenses by participating exhibitors. 532 F.Supp. at 1255. He went on to express his view that splits would not be illegal *per se* market divisions unless they eliminated *all* competition in a given area for specified films. *Id.* The

defendants in the instant case have seized upon this language from *General Cinema*, arguing that the Milwaukee split cannot be classified as a market allocation because it does not eliminate all competition for films. In the defendants' view, an arrangement cannot be characterized a market allocation unless it leaves no room for competition.

Yet in the context of the split agreement, it is the exhibitors who hold the cards in determining whether competition for particular films will be allowed to occur. The fact that the exhibitors may choose to compete with respect to some films does not mean that the basic split agreement, when adhered to, is any less anticompetitive. Moreover, the Court has determined that the very purpose of the defendants' split agreement has been to eliminate competition among themselves. Whether they have succeeded in doing that altogether is not necessary to the determination that the split is a *per se* market allocation. It is enough that the defendants have set up a scheme to divide products among themselves with the purpose of eliminating competition with respect to those products. Accordingly, the Court holds that the split agreement must be condemned *per se* as a market allocation as well as price fixing.

V. RELIEF

Although the focus of the evidence presented in the instant case was the Milwaukee split agreement, evidence was presented indicating that the defendants are engaged in split agreements in other markets throughout the United States. The Government seeks an order enjoining the defendants from splitting motion pictures anywhere in the country.

There is authority for granting the broad relief sought by the Government, *see United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88-95, 71 S. Ct. 160, 169-172, 95 L. Ed. 89 (1950), and the Court believes such relief is appropriate here. Although splits may vary in their mechanics from market to

market, their essential anticompetitive nature does not change.

For this reason, the Court hereby ORDERS that judgment be entered in favor of the Government and against the defendants, declaring that the defendants are in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and enjoining the defendants as follows:

> The defendants are hereby enjoined from further engaging in any motion picture split agreements, in any form and with any person, in any motion picture exhibition market throughout the United States.

Such order shall become effective upon the entry of judgment.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 22, 1985

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. GEORGE C. EDWARDS, Senior Judge*

UNITED STATES OF AMERICA; *Plaintiff-Appellee,*	Appeal from the United States District Court for the Eastern District of Wisconsin
No. 83-2518 *vs.*	
CAPITOL SERVICE, INC., KOHLBERG THEATRES SERVICE CORPORATION, MARCUS THEATRES CORPORATION AND UNITED ARTISTS THEATRE CIRCUIT, INC., *Defendants-Appellants.*	No. 80 C 407 Robert W. Warren, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Defendants-Appellants United Artists Theatre Circuit, Inc., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable George C. Edwards, Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

(3)

No. 85-234

Supreme Court, U.S.
FILED
OCT 9 1985
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED ARTISTS COMMUNICATIONS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court acted within its discretion in enjoining defendants from again participating in a type of price-fixing and customer allocation scheme that was found to be a per se violation of the Sherman Act.

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UNITED ARTISTS COMMUNICATIONS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 756 F.2d 502. The opinion of the district court (Pet. App. 12a-54a) is reported at 568 F. Supp. 134.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1985. A petition for rehearing was denied on April 22, 1985 (Pet. App. 55a). On July 25, 1985, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including August 1, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 5, 1980, the United States filed this antitrust suit against the operators of 90% of the first-run motion picture theater screens in the Milwaukee, Wisconsin metropolitan area. The complaint alleged that defendants participated in a type of cartel arrangement, known in the trade as a "split," that violated Section 1 of the Sherman Act, 15 U.S.C. 1. The "split" operated as follows: beginning in November 1977, defendants' executives met several times a year, reviewed a list of the movies scheduled to be released by motion picture distributors in the next few months, and then agreed on which theater would have the right to negotiate with a distributor, without competition from the others, for a license to exhibit a particular movie. By the end of each meeting, they had allocated, or "split," among themselves the negotiating rights to all major and most minor movies. Pet. App. 2a-3a. The government sought to enjoin splits in Milwaukee and nationwide (Pet. App. 53a).

2. At trial, defendants admitted the existence of the Milwaukee split (Pet. App. 23a); their main defense was that the split agreement, though opposed by distributors, was a "good" split and was a better mechanism for distributing films than the prior competitive bidding system.

Following a lengthy trial, the district court concluded that the arrangement was anticompetitive in purpose and effect, and that splits generally are anticompetitive. The court first found that defendants had allocated among themselves the rights to negotiate for films released by movie distributors (Pet. App. 23a). Their scheme also included subagreements not to bid for films, not to negotiate for any film until it was allocated, and not to negotiate for a film assigned to another member of the group (*id.* at 28a-35a). The court rejected defendants' claim that they had allocated only a "right of first negotiation" that was not anticompetitive, finding instead that "the so-called 'right of

first negotiation,' even as described by the defendants, is an impediment to price competition in the market" (*id.* at 28a-29a). Indeed, as the court explained, the practicalities of film licensing made the right of first negotiation an "empty phrase" (*id.* at 33a (footnote omitted)):

> Once a batch of films has been split, the screens for a particular period of playtime are booked up. A distributor has little chance of entering into meaningful negotiations for the licensing of a film at a theatre other than the split designee because other theatres have been designated for other films.

The district court also found that defendants formed the Milwaukee split to eliminate what they considered "excessive terms" produced by the competition that previously existed in the market (Pet. App. 24a-28a). In reaching this conclusion, the court relied largely on defendants' "damning admissions," such as their view that competition was tantamount to "murder," "rape," "extortion," and "cremation" and produced "ridiculous deals." *Id.* at 24a-27a.

The district court also found that defendants succeeded in their goal of reducing price competition. From 1977 to 1981 the number of films upon which bids were submitted fell from 317 to zero (Pet. App. 30a). Concomitantly, "guarantees"[1] dropped from $1.8 million during 1977 (pre-violation) to only $140,000 in 1981 (*id.* at 35a).[2]

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[1]"Guarantees" are minimum film rental payments that the exhibitor pays to the distributor, regardless of the film's actual box office performance (Pet. App. 15a). If a film performs below expectation, the guarantee may well exceed the distributor's percentage of the box office receipts. In this manner, the exhibitor shares with the distributor the substantial risks inherent in producing and distributing films (*id.* at 16a).

[2]In addition, the number of adjustments in film rental payments favorable to exhibitors increased, and fewer distributors earned top terms (Pet. App. 36a-37a).

Based on these findings, the district court concluded that the split constituted both price fixing and market allocation and thus was illegal per se under Section 1 of the Sherman Act. The court relied heavily on *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692-693 (1978), in which this Court held that an agreement among competitors that effectively precluded competitive bidding was "on its face" a violation of Section 1 because the ban on bidding deprived customers of the ability to compare prices in selecting services from the defendants. In a similar manner, the district court held, splits eliminate both competitive bidding and competitive negotiations, and thus deprive distributors of the ability to compare simultaneous offers (Pet. App. 42a-44a). The court also held that the split was a market allocation scheme and for that reason as well it was a per se violation of Section 1 (*id.* at 51a-53a). The court rejected defendants' argument that this Court's decision in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc. (BMI)*, 441 U.S. 1 (1979), prohibited per se condemnation of splits. Unlike the blanket licenses involved in *BMI*, split agreements do not create a new product unobtainable through individual licensing, but instead are simply a cartelization of distribution of an existing product (Pet. App. 44a-45a).[3]

Finally, the district court granted the nationwide injunctive relief prohibiting splits that the United States sought in its complaint. Relying on evidence "that the defendants are engaged in split agreements in other markets throughout the United States", the court found that "[a]lthough splits may vary in their mechanics from market to market, their

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[3]Accordingly, the court held that the Sherman Act precluded defendants' argument that splitting is superior to competition as a means for distributing films. In any event, the court noted that it had "serious doubts" that defendants were correct in asserting the potential benefits of splitting (Pet. App. 49a).

essential anticompetitive nature does not change" (Pet. App. 53a-54a).[4]

3. On appeal defendants did not challenge the district court's conclusion that the Milwaukee arrangement was a per se violation of the Sherman Act and should be enjoined (Pet. App. 5a). Rather, they argued that the district court was wrong in finding that all splits are basically the same. They claimed that "good" splits might exist elsewhere, involving only a "right of first negotiation" and thus that nationwide relief was improper (*id.* at 5a). The court of appeals unanimously affirmed (*id.* at 1a-11a). It agreed with the district court's finding that all splits, even those that purportedly involve only a "right of first negotiation", are basically anticompetitive (*id.* at 8a-9a) and are per se illegal. Accordingly, the award of nationwide injunctive relief was well within the district court's discretion (*id.* at 10a).

ARGUMENT

The entry of a nationwide injunction rests on the factual finding, concurred in by both courts below, that all splits are fundamentally anticompetitive and that in the circumstances of the film industry even a "right of first negotiation" is anticompetitive. There is no reason to review this factual issue. *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde*, 336 U.S. 271, 275 (1949). To the extent that questions of law may be presented, the decision below is consonant with the decisions of

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[4]Defendants admitted their participation in numerous other splits nationwide (Pet. App. 53a). They did not seek discovery concerning their other splits, nor could they reasonably have done so, for they already knew their own operations. Defendants also expressly disclaimed discovery of the mechanics of other exhibitors' splits. C.A. Rec. 45, at 17-20. The district court did, however, refuse defendants' request for discovery on the limited subject of participation by *distributors* in splits nationwide (Pet. App. 10a).

this Court and of other courts of appeals and thus does not warrant further review.

1. Petitioner[5] argues that, because "good" splits that confer only a "right of first negotiation" may exist outside Milwaukee, the relief granted in this case is overly broad (Pet. i). The district court, however, rested its injunction squarely on the finding that "[a]lthough splits may vary in their mechanics from market to market, their essential anti-competitive nature does not change" (Pet. App. 53a-54a). Moreover, the court found that in the movie industry even a supposedly benign "right of first negotiation" is "an empty phrase" (Pet. App. 33a). The court of appeals agreed (*id.* at 8a-9a). In these circumstances the entry of a nationwide injunction was clearly within the court's discretion in fashioning relief. *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 90 (1950) (nationwide injunction against an illegal patent license scheme used only in the East); see also *FTC* v. *Broch & Co.*, 368 U.S. 360, 363-364 (1962).

In any event, the justifications petitioner advances for hypothetical "good" splits elsewhere are precisely the justifications it advanced unsuccessfully to defend the Milwaukee arrangement. See Pet. App. 5a-6a. This argument does not warrant review because the record contains ample support for the district court's findings that all splits are basically the same as the Milwaukee scheme and that the right of first negotiation is an "empty phrase" in this industry. For example, petitioner's executive vice president, who set up the Milwaukee split, testified that petitioner's film buyers were instructed to follow common procedures in splitting films. Tr. 3904-3905, 3927; DX 506.[6] In 1979, petitioner

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[5]Only one of the defendants has sought review in this Court.

[6]Thus, petitioner is incorrect in asserting (Pet. 4 n.4) that the only evidence of splits in other markets was "by distribution company executives about splits ten to twenty years ago that did not involve these exhibitors."

participated in at least 20 splits nationwide (GX 23). The vice president of another defendant agreed at trial that his company operates splits in other cities "pretty much the same way" as in Milwaukee (Tr. 2889).

The unanimous evidence provided by motion picture distribution companies demonstrated that all splits are similar, anticompetitive, and harmful to distributors. Although in different cities "the product is split in different ways, * * * essentially a split is a split" (Tr. 1577) and all such collusive schemes are designed "to eliminate competition and * * * to reduce film rental" (Tr. 768-769). See also Tr. 678, 1292, 1268-1269, 1547, 2013, 2016.[7] Thus, there was ample basis for the district court's finding that "[o]nce a batch of films has been split, the screens for a particular period of playtime are booked up" (Pet. App. 33a).

Moreover, with respect to petitioner's contention that a "right of first negotiation" would be compatible with antitrust law, the record shows that "in reality * * * it precludes other people having the right to negotiate. * * * [It] is strictly a subterfuge and it doesn't really mean anything" (Tr. 1585-1587).

2. Petitioner's challenge to the injunction is groundless for the additional reason that even the hypothetical "good" split it posits would be illegal per se.

Petitioner concedes that a "good" split eliminates competitive bidding for film licenses: indeed, that is supposedly its virtue (Pet. 7-8). Nonetheless, it is suggested that a

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[7]The district court's finding on the similarity of splits is in accord with the only other judicial examination of splits nationwide. In *General Cinema Corp.* v. *Buena Vista Distribution Co.*, 532 F. Supp. 1244 (C.D. Cal. 1982), the district court found the basic similarity and per se illegality of splits nationwide to be so clear that it granted summary judgment and issued a nationwide injunction against splitting.

"good" split is lawful because it gives only a "right of first negotiation". By this, petitioner apparently means that if a distributor objects to negotiating with only the assigned exhibitor and demands competitive negotiation on that film, the other exhibitors have a right to compete for the film. Pet. 6.[8]

Such an agreement among independent competitors, however, amounts to unlawful interference with market forces of the kind considered by this Court in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). Indeed, in one important respect petitioner's proposed restraint is even more anticompetitive than the arrangement struck down in *Professional Engineers*. There, although engineers agreed not to bid competitively, the customer was wholly free from the start to choose the engineer with whom he would deal. By contrast, in petitioner's "good" split the cartel takes even the initial choice of theater away from the distributor. In other respects, splits harm competition in the same ways as the restraint in *Professional Engineers*—by eliminating competitive bidding, forcing customers into a form of diminished competition, and "imped[ing] the ordinary give and take of the market place." *Id.* at 692.

Splits are also subject to per se condemnation because they divide markets among buyers, as the courts below correctly held (Pet. App. 51a-53a; 8a-9a). See *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951).

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[8]At trial, defense witnesses described the Milwaukee scheme as the essence of a "good" split and testified that the customer allocations were permanent unless distributors objected, and, even if distributors did object, the allocations would last for a "reasonable amount of time" (Pet. App. 28a n.6; C.A. Rec. 162, Defendants' Proposed Findings of Fact ¶ 174).

There is no merit to petitioner's contention (Pet. 8) that the decision below conflicts with *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). There, the Court recognized that not all conduct that appears at first blush to be price-fixing is necessarily illegal per se; the agreement at issue in that case created a product that otherwise would not exist, and was therefore analyzed under the rule of reason. *Id.* at 13. See also *NCAA* v. *University of Oklahoma*, No. 83-271 (June 23, 1984), slip op. 27. Unlike the agreement in *Broadcast Music*, splits do not create a new product nor do they constitute joint productive activity. Rather, splits are horizontal agreements that restrain market forces and that have a "pernicious effect on competition and lack of any redeeming virtue." *Northern Pacific R.R.* v. *United States*, 356 U.S. 1, 5 (1958). See also R. Bork, *The Antitrust Paradox*, 268-269 (1978).

Since *Professional Engineers* dictates the holding that all splits are per se illegal, there is no merit to petitioner's claim (Pet. 5) of a conflict with the Third Circuit's decision in *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.*, 320 F.2d 285 (1963), aff'd by an equally divided Court, 378 U.S. 123 (1964). *Viking Theatre* held in unusual circumstances that a split in Philadelphia was not per se illegal. 320 F.2d at 293.[9] Subsequent court of appeals decisions have uniformly recognized the anticompetitive

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[9] *Viking Theatre* was a private antitrust damage suit by an exhibitor allegedly excluded from a local distribution scheme. The plaintiff did "not argue[] that all split systems are illegal; the substance of the plaintiff's argument is that those which do not include all exhibitors are per se illegal." 320 F.2d at 293. Thus, plaintiff complained only about its exclusion from the split. And the court of appeals affirmed the district court's dismissal of the complaint on the ground that plaintiff had failed to prove a conspiracy and failed to prove injury. *Id.* at 288.

purpose and effect of splits[10] and whatever force *Viking Theatre* may once have had, it has been superseded by *Professional Engineers*. Even less helpful to petitioner is *Greenbrier Cinemas, Inc.* v. *Attorney General*, 511 F. Supp. 1046 (W.D. Va. 1981), in which the district court held, on a truncated record, that a split in Charlottesville, Virginia, was not per se illegal. As the court below correctly observed (Pet. App. 7a), *Greenbrier* failed even to mention *Professional Engineers*, and omitted any consideration of the effect of splits on competition or price.[11]

3. Finally, even if there were any foundation for petitioner's supposition that "good" splits might exist elsewhere, the district court acted well within its discretion in

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[10]Prior to the present case the courts of appeals had considered splits principally in the context of damage actions by excluded theater owners. Not surprisingly, such plaintiffs have repeatedly failed to prove damages, for the courts have recognized that splits eliminate competition among the participating exhibitors (thus benefitting the excluded exhibitors by reducing the competition they faced) and that the motivation behind this elimination of competition is the desire to reduce film rental costs. *Admiral Theatre Corp.* v. *Douglas Theatre Co.*, 585 F.2d 877, 882, 890 (8th Cir. 1978); *Wilder Enterprises, Inc.* v. *Allied Artists Pictures Corp.*, 1979-2 Trade Cas. (CCH) ¶ 62,886, at 79,129 (E.D. Va. 1979), aff'd, rev'd and remanded in part, 632 F.2d 1135 (4th Cir. 1980); *Dahl, Inc.* v. *Roy Cooper Co.*, 448 F.2d 17, 20 (9th Cir. 1971); *Royster Drive-in Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F.2d 246, 250 (2d Cir.), cert. denied, 361 U.S. 885 (1959); *Seago* v. *North Carolina Theatres, Inc.*, 42 F.R.D. 627, 638 (E.D.N.C. 1966), aff'd per curiam, 388 F.2d 987 (4th Cir. 1967), cert. denied, 390 U.S. 959 (1968). *Cinema-Tex Enterprises, Inc.* v. *Santikos Theatres, Inc.*, 414 F. Supp. 640 (W.D. Tex. 1975), aff'd and rev'd in part, 535 F.2d 932 (5th Cir. 1976). See also *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190, 198, 204-205 (9th Cir.) cert. denied, 379 U.S. 880 (1964).

[11]*Greenbrier* was a declaratory judgment action by an exhibitor challenging a Department of Justice press release, and, contrary to petitioner's assertion (Pet. 6), the United States never filed a complaint in the case. The opinion was rendered after a three-day trial on an unusual stipulation that there would be no evidence of the purpose or effect of the Charlottesville split.

enjoining the petitioners from participating in such arrangements. "The fashioning of a decree in an antitrust case in such way as to prevent future violations and eradicate existing evils, is a matter which rests largely in the discretion of the court." *Associated Press* v. *United States*, 326 U.S. 1, 22 (1945). See *Milk Producers Ass'n* v. *United States*, 362 U.S. 458, 473 (1960). In discharging the responsibility to formulate effective remedies, the district court's function "does not end with enjoining continuance of the unlawful restraints" (*United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 171 (1948)), and is "not limited to prohibition of the proven means by which the evil was accomplished. Acts entirely proper when viewed alone may be prohibited." *United States* v. *United States Gypsum Co.*, 340 U.S. at 88-89 (footnote omitted). In *United States* v. *Loew's, Inc.*, 371 U.S. 38, 41, 52-56 (1962), the district court found that only some of the contested licensing agreements were unlawful, and this Court upheld—indeed broadened—a decree enjoining defendants from repeating their unlawful conduct. In the present case the district similarly took the unremarkable step of directing the defendants not to engage again in conduct found to violate the law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 85-234

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED ARTISTS COMMUNICATIONS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR AMICI CURIAE IN SUPPORT OF RESPONDENT AND IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED ARTISTS CORPORATION
UNIVERSAL FILM EXCHANGES, INC. and
WARNER BROS. DISTRIBUTING CORPORATION

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QUESTION PRESENTED

Whether petitioner, which expressly waived in the court of appeals any appeal of the merits of the district court's findings of fact and its conclusions, and which acknowledges in its petition to this Court that the modification by the court of appeals of the district court's injunction is in accordance with the requests made by petitioner to the court of appeals, may maintain this appeal solely to object that "the Seventh Circuit's opinion contains language which could be interpreted as condemning even so-called 'good' splits. . . ." (Petition, p. 4.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-234

UNITED ARTISTS COMMUNICATIONS, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR AMICI CURIAE IN SUPPORT OF RESPONDENT AND IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTEREST OF THE AMICI CURIAE

This amicus brief is filed in support of respondent, with the consent of all parties, on behalf of nine motion picture distribution companies. The letters of consent are being filed concurrently with the Clerk of this Court. The nine companies are: Buena Vista Distribution Co., Inc.; Columbia Pictures Industries, Inc.; Embassy Pictures; Orion Pictures Distribution Corp.; Paramount Pictures Corporation; Twentieth Century-Fox Film Corporation; United Artists Corporation; Universal Film Exchanges, Inc.; and Warner Bros. Distributing Corporation.

The amici are motion picture distributors who compete with each other for the talent which goes into the production of feature films, and they also compete for the right to distribute

films produced by independent producers. These amici "manufacturer-wholesalers" also compete with each other, as to each of their films, for access to the "retail market" consisting of theatres operated by motion picture exhibitors such as petitioner and its co-defendants Capitol Service, Inc., Kohlberg Theatres Corporation and Marcus Theatres Corporation.

Petitioner and its co-defendants are motion picture theatre owners and operators who control 94 percent of the first-run screens in the Milwaukee metropolitan area. By agreeing among themselves to "split" all of the distributors' films so that only one exhibitor has the right to negotiate for a given film, they have deprived these distributors of the right to market their products in a free competitive market. As the district court held, they have thereby controlled prices by substantially doing away with guarantees and firm term bids, obtaining greater adjustments on film rentals, and dictating the length of the playing time of a film. In this way they divert to exhibitors revenues which otherwise in a competitive market would reward the most competent producers and distributors, a market distortion which necessarily affects adversely the movie-going public with regard to the number and quality of feature films available, to the public injury.

Petitioner and its co-defendants also own and operate 1,000 motion picture theatre screens throughout the country and many theatres throughout Wisconsin, and they admit to being parties to split agreements in such other areas. In the petition filed with this Court, petitioner concedes that defendants' wrongdoing in Milwaukee should be enjoined. Petitioner also acquiesces to the injunction decree as modified by the court of appeals, which incorporated into the judgment the district court's definition of a split as an agreement not to

engage in competitive bidding, an agreement not to negotiate for pictures until they have been split, and an agreement not to negotiate for films split to other exhibitors. Nonetheless petitioner has filed this petition to ask this Court to comment on the court of appeals' opinion wherein it states that splits represented by petitioner to be "good" splits are anticompetitive. Petitioner seeks such an advisory ruling that it might make new split agreements in Milwaukee and elsewhere and be permitted to defend each one, case by case, as a reasonable restraint under the rule of reason.

Petitioner seeks to persuade this Court to such a ruling because it would be tantamount to a license to continue to violate the law. Neither the government nor these distributors would have the resources to pursue each such horizontal agreement among exhibitors city by city, and the problem is compounded for these distributors by the fact that a distributor daring to challenge splits in court is faced with retaliatory refusals to deal by dominant nationwide 1000-screen theatre-owner chains. (Tr. 3441, 1289, 128, 3954, 2411, 1127.)

Only the continuance of the application of the *per se* rule will deter such invidious conduct in the future in Milwaukee and in other markets. In the absence thereof, exhibitors will conclude that it is cheaper to litigate than to bring their business practices into conformity with the law. This view was presented by the president of one of the exhibitor defendants, discussing this very action, when he wrote:

> "Speaking for myself and my equity in the theatres, this suit would have to get very expensive before it would be cheaper in the long run to go to open bidding than pay the legal fees." (Memorandum of Dean D. Fitzgerald, President, Capitol Service, Inc., dated May 8, 1980, GX 41.)

SUMMARY OF ARGUMENT

Petitioner did not appeal from any of the findings and conclusions of the district court, and it concedes that the judgment and injunctive decree as modified by the court of appeals meet the objections which they raised in that court. Therefore it is not seeking to appeal from any judgment or order; it merely seeks to have this Court comment on language in the Seventh Circuit's opinion. There is therefore no judgment presented for reversal or modification to this Court, and the case is moot.

Even if petitioner had preserved its right to appeal the adjudication of *per se* illegality instead of conceding it and acquiescing in that ruling by the lower court, there is neither a conflict among circuits nor any new issue for determination by this Court. Horizontal arrangements to foreclose competition such as that among petitioner and its co-defendants have uniformly been condemned by courts of appeal and by this Court. Furthermore, even if the issue of *per se* illegality had been raised, the lower courts had ample evidence before them to support the ruling of *per se* illegality and the judgment decree as modified. Petitioner's horizontal agreement with its co-defendants is a restraint which is clearly unlawful *per se* under prior rulings of this Court and does not present any new issues for determination.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS ACQUIESCED IN ALL OF THE RULINGS OF THE LOWER COURTS AND THERE IS NO ORDER OR DECREE AS TO WHICH IT SEEKS REVERSAL. PETITIONER HAS FAILED TO PRESENT ANY JUSTICIABLE CONTROVERSY FOR RULING BY THIS COURT.

The district court found and concluded: "THE MILWAUKEE SPLIT IS PER SE ILLEGAL". *United States* v. *Capitol Service, Inc.*, 568 F.Supp. 134, 148 (E.D. Wis. 1983). The district court entered judgment enjoining the defendants as follows:

> "The defendants are hereby enjoined from further engaging in any motion picture split agreements, in any form and with any person, in any motion picture exhibition market throughout the United States." (568 F. Supp. 155.)

In their appeal to the Court of Appeals for the Seventh Circuit, petitioner and its co-defendants did not appeal from the district court's ruling that the Milwaukee split is illegal *per se*. They waived this issue by the following statement in their Brief (p. 6):

> "[M]indful of the mandate of Rule 52(a) that findings of fact may not be set aside unless clearly erroneous, (which places a severe burden on appellants), appellants are not directing this appeal at the merits of the lower court's conclusions about the Milwaukee split itself."

On appeal petitioner and its co-defendants objected only that the injunction was too broad in failing to refer to three specific elements found to exist in the Milwaukee split; and the court of appeals modified the judgment to satisfy petitioners' objection that the term "split" in the injunction should have

been defined to relate to "the three specific Milwaukee Agreements." The Court of Appeals ruled:

> "Appellants also contend that the injunction is imprecise in that 'split' is not defined. See *Federal Rules of Civil Procedure* 65(d). We believe, however, that the District Judge carefully defined the term 'split' as used in his injunctive order as follows:
>
> 1. 'an agreement not to engage in competitive bidding.'
> 2. 'an agreement . . . not to negotiate for pictures until they have been split,' and
> 3. 'an agreement . . . not to negotiate for films split to other [exhibitors].'
>
> *United States* v. *Capitol Service, Inc.*, 568 F. Supp. at 143, 145. We also believe that this definition should be regarded as incorporated into his judgment. It is so ordered." (*United States* v. *Capitol Service, Inc.*, 756 F.2d 502, 507 (7th Cir. 1985).)

The petition to this Court concedes that neither the *per se* ruling nor the judgment as modified are contested:

> "The district court, **in a finding petitioners did not appeal from,** ruled that **the split before it was illegal per se** since it involved agreements by the exhibitors not to engage in competitive bidding, not to negotiate for pictures until they had been split and not to negotiate for films split to other exhibitors (Pet. App. 4a-5a). In its injunction, however, the district court went beyond the specific split involved in this case. . . .
>
> "On appeal, the Seventh Circuit ordered that the district court's injunction be read as applying only to splits which involved agreements not to engage in competitive bidding, not to negotiate for pictures until they have been split and not to negotiate for films split to other exhibitors (Pet. App. 11a). At the same time, however, the Seventh Circuit's **opinion contains language** which could be interpreted as condemning even so-called 'good' splits. . . ." (Petition, pp. 5, 6; emphasis supplied.)

Therefore, since petitioner admits that the judgment as modified by the court of appeals met the only objections it

raised in that court, petitioner has waived its right to present additional matters to this Court. *United States* v. *Ortiz,* 422 US 891, 898 (1975); *Tyrell* v. *District of Columbia,* 243 US 1 (1917); *California* v. *Taylor,* 353 US 553 (1957). Furthermore, petitioner is in effect only requesting affirmance with an admonition to the court of appeals with respect to language in its opinion. Petitioner cannot appeal from an injunction which was modified in accordance with its requests to the court of appeals. *Perez* v. *Ledesma,* 401 US 82, 87 (1971); *Gunn* v. *University Committee,* 399 US 383, 390 (1970). In addition, the court of appeals having modified the decree in exact accordance with petitioner's stipulations, this case is moot and there is no case or controversy presented to this Court for adjudication. *Preiser* v. *Newkirk,* 422 US 395, 401 (1975); *Jones* v. *Hildebrandt,* 432 US 183, 187 (1977); Stern & Gressman, *Supreme Court Practice* (5th ed.), pp. 885-6.

II.

THERE IS NEITHER A CONFLICT AMONG CIRCUITS NOR ANY NEW ISSUE FOR DETERMINATION BY THIS COURT. HORIZONTAL ARRANGEMENTS TO FORECLOSE COMPETITION SUCH AS THIS HAVE UNIFORMLY BEEN CONDEMNED BY COURTS OF APPEAL AND BY THIS COURT.

Contrary to petitioner's contentions, the term "split" has obtained an established meaning in the courts which is consistent with the Seventh Circuit's statement that "a right of first negotiation as described by defendants, no matter how flexible in theory, is an agreement among competitors to a horizontal restraint on competition illegal *per se* under Section 1. *White Motor Co.* v. *United States,* 372 U.S. 253, 263 . . . (1963); *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593 (1951)." (756 F.2d 506). All other circuits that have considered this question have consistently reached the same con-

clusion as the Seventh Circuit with regard to the anticompetitive nature of such horizontal arrangements among exhibitors. For example:

Royster Drive-In Theatres, Inc. v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F.2d 246, 250 (2nd Cir.), *cert. denied*, 361 U.S. 885 (1959):

> "the so-called 'split' system, whereby exhibitors divide the list of available pictures and then approach the distributors separately on that basis, enables them to purchase films at lower prices."

Twentieth Century-Fox Film Corp. v. *Samuel Goldwyn*, 328 F.2d 190, 205-6 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964):

> "... [T]he agreements referred to in the findings of fact, were, for the most part, arrangements between exhibitors, under which a given exhibitor was given the first opportunity to negotiate for a picture or pictures. There were, however, no agreements that if the first negotiation failed the other exhibitor or exhibitors were foreclosed from negotiating for the picture. Nor were there any agreements as to prices to be offered or paid....
>
> * * * *
>
> "[This constituted a concert of exhibitors which] restrained and eliminated competition with respect to plaintiff's pictures by agreements to eliminate competitive bidding."
>
> * * * *
>
> "... [H]onest competitive bidding resulted in the payment of higher film rentals, and increased playing time as compared to ... [split agreements]."

Dahl, Inc. v. *Roy Cooper Co., Inc.*, 448 F.2d 17, 20 (9th Cir. 1971):

> "... [E]xhibitors in the area operated under a 'split-of-product' agreement ... by which they divided the available film between themselves so as to eliminate competition between themselves as to those films.... [T]he agreement [was] ... anticompetitive in character and as such subject to complaint by the distributors."

Admiral Theatre Corp. v. *Douglas Theatre Co.*, 437 F. Supp. 1268, 1294 (D. Neb. 1977), *aff'd*, 585 F.2d 877 (8th Cir. 1978):

> "Exhibitor-defendants' split, which was formed to lessen the distributors' ability to extract onerous rental terms, was designed to limit competition among the split members by dividing films in such a way that any member would not have to bid against another member to obtain a film."

Cinema-Tex Enterprises, Inc. v. *Santikos Theatres, Inc.*, 414 F. Supp. 640, 643 (W.D. Tex 1975), *aff'd in part and rev'd in part* (vacating *per se* ruling as unnecessary to disposition of the case), 535 F.2d 932 (5th Cir. 1976):

> "The distributor . . . could deal only with the exhibitor who was awarded the picture in the split unless negotiations with that exhibitor were non-productive and the distributor could solicit bids from other exhibitors. As the Ninth Circuit pointed out in *Dahl, Inc.* v. *Roy Cooper Co.*, 448 F.2d 17 (9th Cir. 1971), such an anticompetitive agreement would give rise to legitimate complaint by distributors."

Wilder Enterprises, Inc. v. *Allied Artists Pictures Corp.*, 1979-2 Trade Cases ¶ 62,886, p. 79,129 (E.D. Va. 1979) *affirmed in part and in part vacated on other grounds*, 632 F.2d 1135 (4th Cir. 1980):

> "The evidence showed the sole purpose and effect of the split was to curtail competitive bidding by split members so as hopefully to lower prices of film licenses."

General Cinema Corp. v. *Buena Vista Distribution Co., Inc.*, 532 F. Supp. 1244, 1252 (C.D. Cal. 1982):

> "After carefully reviewing the record, however, the court has come to the conclusion that all splits by definition have at least one critical anticompetitive characteristic in common—an agreement or understanding by exhibitors participating in the split to refrain from competing against the split designee while its right or opportunity to negotiate continues."

Petitioner states as to a number of the foregoing authorities that they held splits "not to be illegal *per se*". (Petition, pp. 2, 3). It is apparent from the foregoing quotations that these courts did not so hold. A number of them did hold that a plaintiff exhibitor failed to show injury from a split when the distributors afforded to him the opportunity to compete for films. This was also the fact in *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.*, 320 F.2d 285 (3d Cir. 1963), affirmed without opinion by an equally divided court, 378 US 123 (1964), where the plaintiff exhibitor did not argue that all split systems were illegal, but only that it was illegal to exclude him from the split even though he was at all times afforded the opportunity to license the films of each distributor notwithstanding the split. (320 F.2d 293.)

Therefore it is apparent that petitioner has not shown that this case is one that comes within the terms of Rule 17.1(a) as "[one in which] a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter...." For the alleged conflict among courts of appeals, petitioner relies primarily on a district court decision, *Greenbrier Cinemas, Inc.* v. *Attorney General*, 511 F. Supp. 1046 (N.D. Va. 1981). (Petition, pp. 4, 5, 6, 9.) Not only is this not a "decision of another court of appeals"; it is also the case that the *Greenbrier* case was so limited by stipulation that it does not constitute a precedent. Thus the Court of Appeals in the instant case noted that *Greenbrier* "has been the subject of criticism" (756 F.2d 505); and in *General Cinema Corp.* v. *Buena Vista Distribution Co.*, 532 F. Supp. 1244, 1265 (N.D. Cal. 1982) the court found the *Greenbrier* analysis "flawed in several critical respects", including a stipulation that no evidence regarding the purpose or effect of splits would be offered, resulting in "the emptiness of the *Greenbrier* holding as a result of this stipulation" because of the *Greenbrier* court's admission that consequently it ruled "**regardless of any effect it might or might not have had on competition or price.**" (532 F. Supp. 1265; emphasis is the court's.)

Nor is petitioner correct when it contends that this case raises new issues of application of the antitrust laws. This case presents merely another example of a horizontal agreement among competitors not to compete, for the purpose of fixing lower prices to be paid by them. Such arrangements have been consistently held by this Court to be unlawful *per se*.

Petitioner testified at trial that even under petitioner's concept of the right of first negotiation (1) it was envisaged that there would be a period from the time that the invitations to bid went out until the picture was split, during which if a distributor approached an exhibitor, the distributor would be rebuffed in attempting to license the picture, (2) the precepts of the split called for a period during which a member of the split would be unable to negotiate with an invitational contact from a distributor by virtue of his agreement with the rest of the split members, and (3) "that's inherent in the term right-of-first-negotiation." (Tr. 4042-3.) Such horizontal agreements to refuse to participate in competitive bidding or competitive negotiations fall clearly within the strictures of *National Society of Professional Engineers* v. *United States,* 435 US 679 (1978).

The authorities cited by petitioner (Petition, p. 9) do not conflict with these principles. In particular, *Continental TV, Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36 (1977), relates to vertical restraints imposed by individual manufacturers on their dealers to promote competition between brands and does not sanction horizontal agreements among competitors such as defendants.

In *Broadcast Music, Inc.* v. *Columbia Broadcasting Systems, Inc.,* 441 U.S. 7 (1979), the agreements made music more widely available yet did not restrict the ability of copyright holders to license performances directly. The blanket license thus created a new competitive alternative: the performer could acquire rights by individual license or blanket license. In contrast:

> "[This agreement] is fundamentally different [from that in *Broadcast Music*] .... [It] is composed of individual[s] ... who compete with one another [and who do not offer a single unique product as joint venturers] ....
>
> ".... But the ... agreements disclosed by the record in this case are among independent competing entrepreneurs. They fit squarely into the horizontal price fixing mold."

Arizona v. *Maricopa County Medical Society,* 457 U.S. 332, 356, 357 (1982).

The defendant exhibitors have admitted under oath that "the reason [for going] ... into the meeting [organizing the split] was to avoid bidding on pictures", and that the splitting agreement allows the companies "to allocate pictures among ourselves. We ... didn't have to put up the huge guarantees because we knew we weren't bidding against each other." (Tr. 1099-1100.) They testified that "the object was to stop killing each other on getting films" and "if we were going to have an arrangement like this, none of us would be responding to a bid." (Tr. 1807-1815.)

By thus agreeing to eliminate competition, they

> "have avoided some of those pitfalls [of higher terms and length of run] by not having a rush into bidding arrangement."
>
> "... those terms are automatically lower for the guy that doesn't have to bid." (Tr. 1067; 1033-4; see also Tr. 1820, 2713, 2771 and Tr. 575-77, 608.)

Such agreements to eliminate competition as the price-setting mechanism are conclusively deemed to be illegal price-fixing agreements without more. *National Society of Professional Engineers* v. *U.S.,* 435 U.S. 679, 681-2 (1978); *Catalano* v. *Target Sales,* 446 U.S. 643, 647 (1980):

> "In *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940), we held that an agreement among competitors to

> engage in a program of buying surplus gasoline on the spot market in order to prevent prices from falling sharply was unlawful without any inquiry into the reasonableness of the program, even though there was no direct agreement on the actual prices to be maintained. In the course of the opinion, the Court made clear that 'the machinery employed by a combination for price fixing is immaterial.' "

Petitioner's criticism of competition in film licensing for "lack of flexibility which often makes it impossible to shorten the length of a run or move a picture to a smaller theatre" (Petition, p. 7) is in reality a defense of a system whereby these exhibitors as concerted monopsonists are able to preempt feature films without sharing any risk of loss and without being bound by contract to exhibit a film for any specified length of time. Similarly, the condemnation of competition's "haphazard and irrational allocation of available pictures to screens" (ibid.) is the hackneyed protest of the cartelists that they could allocate resources more efficiently than competition does.

> "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination." *Arizona* v. *Maricopa County Medical Society,* 457 US 332, (1982), quoting *Socony-Vacuum;* see also *National Society of Professional Engineers* v. *U.S.,* 435 U.S. 679, 690, 692, 696 (1978); *Catalano, Inc.* v. *Target Sales, Inc.,* 446 U.S. 643, 649 (1980).

CONCLUSION

For the foregoing reasons, amici respectfully suggest that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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TWENTIETH CENTURY-FOX FILM CORPORATION
UNITED ARTISTS CORPORATION
UNIVERSAL FILM EXCHANGES, INC. and
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